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Supreme Court of the United States

OCTOBER TERM—1931.

No. 200—No. 201

HARRY M. BLACKMER,
Appellant,

v.

UNITED STATES,
Appellee.

APPELLANT'S SUPPLEMENTAL REPLY BRIEF.

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FOREWORD

The fundamental positions of Appellant were set forth in the brief filed with his petition for writs of certiorari, herein referred to as "our first brief" and in his brief, herein referred to as "our first reply brief", in reply to that filed by Appellee in opposition to the granting of the writs. After this Court granted the writs, Appellee filed an additional brief, herein referred to by the initials A. B., and Appellant submits this supplemental reply brief in answer thereto.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1931.

No. 200. No. 201.

HARRY M. BLACKMER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee.*

APPELLANT'S SUPPLEMENTAL REPLY BRIEF.

REPLY A

The Invalid Subpoena and Consular Function

Preliminary

In our reply to that part of appellee's first brief (in opposition to the petition for writs of *certiorari*) which advanced arguments of expediency to support the constitutionality of the Act, we said:

> (Our first reply brief, p. 6) "It may be conceded that the Act in question is unconstitutional without it following that a valid law could not be enacted which would serve the same purpose even more efficiently. If the authors of the Act had not sought their precedents in outlawry (seizure of property to coerce appearance), the Inquisition

(subpoenas on "belief" and trials in *absentia*), and the religious quarrels of the reign of Queen Elizabeth (for the name of the crime—"recusancy"),—had instead paid more attention to the decisions of this court, a way would have opened."

We were hinting the presumption of argument that if the Walsh Act should be declared unconstitutional the Government would stand powerless with respect to the testimony of absent citizens. We did not elaborate our theory because it is not our burden to point the way to a valid act, because we wanted to avoid irrelevant by-paths, and because in our opinion if a constitutional act were passed it would nevertheless represent unsound policy having in mind the proper liberties and convenience of the citizen.

To relieve appellee's curiosity and to end its fantastic conjecturings, we will say that we were thinking of methods referred to in the cases cited by it, to wit, *Hess* v. *Pawloski*, 274 U. S. 352; *Wuchter* v. *Pizzutti*, 276 U. S. 13 (A. B., pp. 17-18).

The Massachusetts law declared valid in the *Hess* case and the New Jersey law declared invalid in the *Wuchter* case, provide for the appointment of a state official as agent for the absent party to receive service of process. The initial jurisdiction *in personam* obtained by service of process upon the defendant's agent within the state is completed (when such legislation is valid) by compulsory informatory notice to the absent defendant at the place of his residence. It is our contention that even under such an Act the notice, in the absence of appropriate treaty provisions, would have to be served by someone other than a consul.

In view of the foregoing we do not regard it as necessary to take up in detail appellee's feverish astronomy to find an admission which does not exist (A. B., pp. 15-19).

The issue as to the subpoena.
The subpoena is not a notice.

Aside from the consular point, the subpoena issue as now developed seems to turn in the main part on whether the service of the subpoena "beyond the jurisdiction of the United States" represents an exercise of power to initiate jurisdiction *in personam*, or is the delivery of a notice of a pre-existing jurisdiction *in personam*.

In this connection we suggest it should be kept in mind that the request for the witness-subpoena under the Act, its issuance and service have no relation to jurisdiction through attachment of property (Act, sec. 2). Jurisdiction through attachment of property is not involved until after the subpoena has been issued, served and disobeyed, and it has been determined to exercise the option to punish (Act, secs. 4, 5, 6).

Appellee's admissions narrowing the issue.

It is helpful to note that appellee admits that without the aid of treaties this nation may not exercise extra-territorial judicial jurisdiction; that if the court does not have preliminary territorial jurisdiction of a *res*, status or personal relationship, the extra-territorial service of process is a jurisdictional act.

So that this may be clearly before the Court, we excerpt the following from appellee's brief:

> (A. B., p. 18) "When it is said that the court 'acquires' jurisdiction by its process, subpoena or summons, the expression relates to the necessity of notice to comply with 'due process', *unless there was no jurisdiction of a personal relation, inherently or by consent, or of a res in custodia legis, in which case it may be said that jurisdiction is 'acquired' by the service of the process.*" (Our italics.)
>
> (A. B., p. 71) "Of course there may be other kinds of process than subpoenas and summons

which are in their execution, an exercise of jurisdiction, such as writs of attachment. *Also, if the court has not taken jurisdiction of the subject matter, such as property, or a status, such as citizenship, which is within its jurisdiction, the process may more properly be termed a jurisdictional act, and command rather than a mere notice.*" (Our italics.)

(A. B., p. 38) "We do not claim the United States has the right to invade by force the territory of another sovereign against its will and to take a citizen into custody and forcibly return him to this country, but we claim the United States has the right to create an obligation of citizens abroad to return, *to enforce the obligation by an exercise of power within the territorial domain of the United States, provided the citizen has had the notice essential to due process.*" (Our italics.)

(A. B., p. 69) "Of course, where the jurisdiction needed is such as will bring the person to the bar of the court to confront witnesses against him and to receive the sentence of the court, actual physical power over the accused may be necessary."

(A. B., p. 76) "In *Dainese* v. *Hale*, 91 U. S. 13 (1875), cited by the appellant (B., 29) the consul undertook to seize property as upon attachment. Can appellant compare such plainly judicial conduct with carrying and delivering a command or notice?"

(A. B., p. 76) "In *Re Ross, Petitioner*, 140 U. S. 453 (1891), cited by appellant (B., 29) the court was considering the effect of constitutional limitations upon the procedure in a consular court. *In holding court a consul exercises a sovereign judicial power which, of course, calls for consent of the sovereign where the court is held.*" (Our italics.)

Appellee's Notice Theory.

These admissions necessarily drive appellee to the position that the subpoena under the Act is a mere notice, the service of which does not involve the extra-territorial

exercise of power. The theory on which it is sought to transform the subpoena into a notice is stated by appellee as follows:

> (A. B., pp. 69-71) "The obvious theory of the Walsh Act is that if the Court grants a petition for the recall and appearance of a citizen desired as a witness that the court thereby takes cognizance of and jurisdiction over the witness' status as a citizen and his relation to the United States and creates an obligation and duty of the citizen to return. But so far it is not such an obligation and duty as would authorize enforcement of a penalty for non-compliance. This is solely because due process and natural justice call for notice to the citizen of the creation of his obligation and duty. It was a potential obligation, inherent in his citizenship, but he must have notice that it has been changed to an actual obligation.
>
> * * * * * * *
>
> "So the Walsh Act requires as the second step that which is necessary to due process—notice—and exercises an option as to the form of notice by specifying that it shall be in the form of a subpoena. That a subpoena is specified does not change the nature or function of what is required or what is given. Form yields to substance. * * * The subpoena would have to be followed with a writ of bodily attachment before it would be anything more than a notice * * *.
>
> "But when the court has taken cognizance of and jurisdiction of a subject matter within its territorial jurisdiction its initial process in essential nature is a mere notice to come in and testify or defend or the consequences may be a default judgment or penalty provided by statute as in the Walsh Act."

Statutory agent cases are not analogous.

In its latest brief appellee has embellished its doctrine that the subpoena under the Act is a mere notice by the addition of statutory agent cases.

An analogy is argued from *Wuchter* v. *Pizzutti, supra,* 276 U. S. 13 (A. B., p. 18). The notice there considered (declared invalid because not required by statute) was an informatory notice advising the absent party that jurisdiction in personam had already been taken by service of summoning process upon his statutory agent within the territorial limits of New Jersey where the action was commenced. The case is quickly distinguished by observing that there is no provision in the Walsh Act for the appointment of a resident statutory agent or for territorial service of any kind.

In Rem Cases are not analogous.

To its point that the subpoena is a mere notice appellee discusses pure *in rem* authorities such as *Perez* v. *Fernandez,* 220 U. S. 224, and *Luria* v. *U. S.,* 231 U. S. 9 (A. B., pp. 44, 47).

These authorities are valueless for the reason that in every *in rem* action there is a territorial status or *res* initially seized for jurisdiction, subjected to litigation, to the court's judgment and to the satisfaction thereof, whereas the most exuberant imagination cannot invent a seized litigated status or *res* out of the issuance and service of the witness-subpoena under the Act.

Luria v. *United States,* 231 U. S. 9 (A. B. p. 47), involved an action under *Section 15 of the Act of June 29, 1906* (34 Stat. 596, 601, c. 3592) to set aside and cancel, as fraudulently and illegally obtained, a certificate of citizenship theretofore issued to Luria. The action was likened by this court to a suit to cancel a patent for public land or letters patent for an invention (Case, p. 28).

Luria's status as a citizen and his certificate of citizenship were within the court's territorial jurisdiction and were directly before the court for litigation. The court, having jurisdiction over the litigated status and of the *res*—the certificate of citizenship,—it was not necessary to acquire personal jurisdiction of Luria by summoning

process; an informatory notice completed the court's jurisdiction to litigate and to pass judgment on that which was before it and which was the proper subject of the suit. It may be added that the validity of the notice was not before this court.

Perez v. *Fernandez*, 220 U. S. 224, cited by appellee (A. B. 44) was also an *in rem* action under *Sec. 57 of the Judicial Code*, and concerned title to property in Porto Rico. The court had initial territorial jurisdiction over the subject matter of the suit—the lands, and an informatory notice, served anywhere to the interested party, was sufficient.

As to *quasi in rem* cases. It was said in *Cooper* v. *Reynolds*, 10 Wall. 308:

> (318) " * * * first, the judgment of the court, though in form a personal judgment against defendant, has no effect beyond the property attached in that suit. * * * Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court. Now, in this class of cases, on what does the jurisdiction of the court depend? *It seems to us that the seizure of the property or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in rem.*" (Our italics)

In treating the same subject *Cooley* draws the distinction between notice and process:

> *(Cooley's Constitutional Limitations*, 8th. ed., vol. 2, pp. 852-856) "But such notice (in *quasi in rem* cases) is restricted in its legal effect, and cannot be made available for all purposes. It will enable the court to give effect to the proceeding so far as it is one *in rem*, but when the *res* is disposed of, the authority of the court ceases. The statute may

give it effect *so far as the subject matter of the proceeding is within the limits, and therefore under the control, of the State; but the notice cannot be made to stand in the place of process; so as to subject the defendant to a valid judgment against him personally.*" (Our italics and parenthesis)

In the case of a witness-subpoena under the Act there is no property or litigated status or *res* upon which jurisdiction to command the testimony of the witness can possibly initiate. There is no territorial levy of a writ of attachment. The petition for the subpoena is required to contain a "proper showing" of need of the absent person's testimony (Act, sec. 2). It has nothing to do with the seizure of property; it does not request a judgment as to a *res* or status or as to anything affecting the witness; it is entirely *ex parte* and cannot be contested. The subpoena when issued commands the absent person's testimony (Act, sec. 2). There is no provision for notice to the witness that the court has seized his property or intends to litigate a *res* or status in which he is interested. The petitions for subpoenas and the resulting subpoenas in the cases at bar fully sustain this interpretation of the Act (R., 200, 1-3, 7, 9; R., 201, 1-4). If the absent person responds to the command of the subpoena he gives testimony at a criminal trial in which he is not a party. The judgment at the criminal trial does not affect him. If the witness does not respond to the command of the subpoena, all that remains is the option to subject him to the separate and later punitive procedure.

Of course, if the subpoena is invalid the punitive procedure is invalid. *Ex parte Fiske*, 113 U. S. 713; see also *U. S.* v. *Shipp*, 203 U. S. 563; *Ex parte Rowland*, 104 U. S. 604; *In re Sawyer*, 124 U. S. 200. And if the punitive procedure were valid it could not reach back to validate the invalid subpoena procedure.

Domicile cases are not analogous.

In developing its argument that the subpoena is a mere notice, appellee cites the following Massachusetts cases:—*Langdon* v. *Doud*, 88 Mass. 423, 435; *Henderson* v. *Staniford*, 105 Mass. 504, 505; *Nichols* v. *Vaughan*, 217 Mass. 548 (A. B., p. 54).

Appellee's excerpt from *Langdon* v. *Doud, supra*, shows its lack of merit as a precedent in the cases at bar (A. B., p. 54):

> (88 Mass. 425) "*So long as a debtor has a last and usual place of abode in the Commonwealth, that is while he retains his domicile or residence here*, the courts of the state have jurisdiction over him and due service of legal process can be made upon him * * * a writ can be served by leaving a summons at his last and usual place of abode, and in case of his absence from the state actual notice * * * can be given to him so that a valid and binding judgment can be obtained" (our italics).

The element of domicile is also emphasized in the following from *Nichols* v. *Vaughan, supra*, 217 Mass. 548 (1914), 105 N. E. 376:

> (105 N. E. 377, 378) "The defendant contends that these decisions are no longer law because of Pennoyer *v.* Neff, 95 U. S. 714, 24 L. Ed. 565, wherein it was held that there could be no personal judgment against a non-resident defendant over whom jurisdiction was obtained solely by attachment of property. *That case does not go to the extent of holding that the courts of the state in which one is domiciled* and to which he owes allegiance cannot acquire jurisdiction over him so as to be able to render a judgment in personam except after personal service of process upon him within the state. There are, however, expressions in several decisions of that court which lend support to that view. *Freeman v. Alderson*, 119 U. S. 185, 188, 7 Sup. Ct. 165, 30 L. Ed. 372;

Clark v. *Wells,* 203 U. S. 164, 170, 27 Sup. Ct. 43, 51 L. Ed. 138; *Caledonian Coal Co.* v. *Baker,* 196 U. S. 432, 444, 25 Sup. Ct. 375, 49 L. Ed. 540; *Goldey* v. *Morning News Co.,* 156 U. S. 518, 521, 15 Sup. Ct. 559, 39 L. Ed. 517; *Mexican Central R. R.* v. *Pinkney,* 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699; *Noble* v. *Union Ring Logging Co.,* 147 U. S. 165, 173, 13 Sup. Ct. 271, 37 L. Ed. 123; *Harkness* v. *Hyde,* 98 U. S. 478, 25 L. Ed. 237. *Cooper* v. *Reynolds,* 10 Wall. 308, 19 L. Ed. 931, goes very far towards sustaining that contention. It is supported by *Raher* v. *Raher,* 150 Iowa, 511, 129 N. W. 494, 35 L. R. A. (N. S.) 292, Ann. Cas. 1912D, 680, *De la Montanya* v. *De la Montanya,* 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, *Smith* v. *Grady,* 68 Wisc. 215, 31 N. W. 477, and *Moss* v. *Fitch,* 212 Mo. 484, 111 S. W. 475, 126 Am. St. Rep. 568. See Ann. Cas. 1912 D 680. Of course if that is the law under the fourteenth amendment of the federal Constitution as established by the Supreme Court of the United States, it is authoritative and binding upon all state courts. *Eliot* v. *McCormick,* 144 Mass. 10, 10 N. E. 705. See also *Porter* v. *Prince,* 188 *Mass.* 80, 74 N. E. 256. *But however that may be, the point here presented is one of interpretation of our statute of limitations and not one of sufficiency of service of process''* (our italics).

The distinction arises from the fact that the Walsh Act makes nothing of the residence or domicile of absent citizens. This is conceded in appellee's brief:

(A. B., p. 15) "In the applications for the issuance of subpoenas and in the petitions for the orders to show cause the government alleged that the appellant is a citizen of the United States and he admits his citizenship. Although the Walsh Act authorizes the subpoenaing of aliens domiciled in the United States temporarily abroad the validity of such provision need not be considered in this case. *The government alleged that the appellant was domiciled in the United States but made no effort to prove the fact and the allegation may be regarded as surplusage.''*

Robertson v. Railroad Labor Board is not authority for extra-territorial service of process.

To a proposition which, if supported, would sustain the subpoena's validity without going further—"A court's jurisdiction to subpoena witnesses is not limited to its territorial jurisdiction or its physical power over the person of the witness" (A. B., p. 64)—appellee discusses *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, and says:

> (A. B., pp. 65, 66) "In this case the court was dealing with a purely *in personam* as distinguished from a *quasi in rem* method of enforcing the attendance of the witness and not with the scope of the power to subpoena. The court was not dealing with the power to authorize an officer to serve papers outside the territorial limits of his sovereign. The court was dealing with the rule established by the judiciary act and that existed at common law and was not considering the power to change the common law or the rule established by the judiciary act so as to permit jurisdiction *in personam* upon service without the territorial jurisdiction of the court. The language used on page 626 of the opinion shows plainly the view of this court that if the statute had so provided the federal court for Illinois could have adjudicated the contempt charge *even though the witness was beyond its territorial jurisdiction. The judgment of the Federal Court in Illinois might have been unenforcible by such court without affecting the validity of its judgment.*" (Our italics.)

The significance of the case escapes appellee. It contains the clearest expressions that Congress has power to extend the reach of process throughout the United States (Case, p. 622). We do not challenge this. But there is not a word in the case to support the reach of process beyond the territorial limits of the United States or beyond a judicial district within the United States as it might be enlarged by Act of Congress.

If the witness is found within the court's territorial jurisdiction whatever its area within the United States, the judgment is enforcible. The power to seize takes care of that. If the witness is beyond the court's territorial jurisdiction whatever its area within the United States, the judgment is unenforcible, is void. Due process takes care of that.

The citation of *Toland* v. *Sprague*, 12 Peters 300 (Case, p. 622) indicates that this court was not unaware of its earlier declaration that the extra-territorial service of process could not have been in the contemplation of Congress.

The important bearing of the *Robertson* case on the validity of the subpoena under the Walsh Act is in its declarations that:

(a) The summoning process of a Federal court commanding personal appearance and personal testimony of a citizen of the United States must be served within the court's territorial jurisdiction (Case, p. 622). Obviously, it follows that when we know the territorial limits of the nation, we know the ultimate reach of personal summoning process.

(b) The territorial principle was a part of our common law existing at the beginning of the nation (Case, p. 622). This destroys the relevancy of contrary English common law doctrines.

(c) Although the case involved the Government of the United States as the moving party and a citizen of the United States as defendant, the doctrine of allegiance received no consideration in this court's construction of the statutes involved to determine the valid reach of summoning process.

(d) Although Congress made it the duty of prospective witnesses to testify before the Railroad Labor Board, and to respond to the summons of Federal courts acting to enforce the right of the Board to secure testimony,

just as it attempted to make it the duty to testify under the Walsh Act,—it was neither argued nor held that such duty or the status of citizenship gave the court an initial *quasi in rem* jurisdiction over the desired witness with the effect of converting the court's summons into a notice which might be served anywhere.

Perhaps this court had in mind the statement in *Blair* v. *United States,* 250 U. S. 273, excerpted by appellee (A. B. 33):

> (p. 281) "The giving of testimony and the attendance upon court or grand jury in order to testify, are public duties which every person *within the jurisdiction* is bound to perform *upon being properly summoned.*" (Our italics.)

(e) The declaration that the territorial limitation on the reach of process applies to the United States as well as to private citizens (Case, p. 623) excludes allegiance as a factor in the problem before us, for surely, the duty of allegiance binds the citizen at Cleveland, Ohio, as well as at Paris, France.

To the same proposition, that is, that a court's jurisdiction to subpoena witnesses is not limited to its territorial jurisdiction or its physical power over the person of the witness, appellee cites *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346 (A. B. p. 66).

In that case it was held that:

> (p. 353) "Ordinarily jurisdiction over a person is based on the power of the sovereign asserting it to seize that person and imprison him to await the sovereign's pleasure. But when that power exists and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required, we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute.

> It applies to Article IV, Sec. 1, of the Constitution, so that if a judicial proceeding is begun with jurisdiction over the person of the party concerned it is within the power of a State to bind him by every subsequent order in the cause. *Nations* v. *Johnson,* 24 How. 195, 203, 204. This is true not only of ordinary actions but of proceedings like the present. It is within the power of a State to make the whole administration of the estate a single proceeding, to provide that one who has undertaken it within the jurisdiction shall be subject to the order of the court in the matter until the administration is closed by distribution, and, on the same principle, that he shall be required to account for and distribute all that he receives, by the order of the Probate Court."

Appellee excerpts the first sentence of that part of the opinion above quoted (A. B., p. 66), omits the remainder which sets out the controlling jurisdictional theory of the case and argues that by the use of the word "ordinarily" this court reserved unnamed exceptions to the rule (A. B., p. 67).

By attention, however, to the entire context in which the word appears, it is clear beyond the slightest doubt that the exception contemplated by the use of the word "Ordinarily" is that:

> (p. 353) "*When that power exists* (the power to seize the person) *and is asserted by service at the beginning of a cause, or if the party submits to the jurisdiction in whatever form may be required,* we dispense with the necessity of maintaining the physical power and attribute the same force to the judgment or decree whether the party remain within the jurisdiction or not. This is one of the decencies of civilization that no one would dispute." (Our parenthesis and italics.)

With the complete principle before us it is apparent that the publication in Michigan and the service on Ferry and his guardians in Utah were construed as notices of

a pre-existing jurisdiction *in personam* which attached to Ferry, when he was in Michigan and qualified himself as executor in the Michigan Probate Court.

Suffice it to say, the Walsh Act does not contemplate service of the subpoena or any other process prior to the citizen's departure from the country; does not provide for the citizen's submission to the jurisdiction of any Federal court prior to his departure and prior to the service of the subpoena (See Act).

The power of recall is not judicial—If it can be delegated to the Judiciary, its exercise must accord with Judicial due process.

With appellee's major divertissements out of the way, we shall give attention to that which we think is most relied upon, to wit, that which is argued from the power of recall and from the doctrine of jurisdiction *in personam* by virtue of sovereign control.

As to the power of recall:—Let it be assumed that the power exists and in some constitutional way may be transferred from the Legislature where it reposes (*Meyers, Administratrix* v. *United States,* 272 U. S. 52, 235) to the judiciary. The assumption implies that the power changes its nature from a legislative to a judicial power. For, otherwise, that which is attempted is a clear violation of the separated powers of our Government under the Constitution. *Federal Radio* [redacted] v. *Gen. Elec. Co.,* 281 U. S. 464; *Muskrat* v. *United States,* 219 U. S. 346. Once the power becomes judicial its exercise, of course, must accord with judicial due process. Judicial due process requires that to obtain jurisdiction *in personam* there must be territorial service of process or voluntary appearance (Our main brief, pp. 25-26; Our first reply brief, p. 18).

We think this meets everything arguable from the power of recall, but perhaps it will not be amiss to give some attention to its nature and as to whether it could possibly function under the Act.

A legislative recall is a political recall. We have seen that the power was exercised in England to coerce the return to that country of absent citizens who were suspected of engaging in conspiracies against the sovereign, and for religious reasons. *Bartue and Duchess of Suffolk*, 2 Dyer's Rep. 176-b, 73 Eng. Rep. Full Reprint, 388; *Knowles* v. *Luce*, Moore 109, 72 Eng. Rep. Full Reprint 473 (A. B. 43-44).

In this country the only exercise of a comparable power by the National Government which we have been able to find has been in connection with calls for the return of absent citizens for military service. It is interesting to note that on such occasions this nation enters into treaties with its allies providing for reciprocal assistance with respect to absent nationals. See, for example, "Convention Providing for Reciprocal Military Service", of 1918, between the United States and France, and similar conventions of the same type and period with Great Britain and Italy. *Malloy's Treaties*, V. III, pp. 2592, 2650, 2708. This court, in *Crapo* v. *Kelly*, 83 U. S. 610, declared that even in the emergency of war the nation's right to reclaim the military service of citizens can be exercised only within its own territory.

The Federal judiciary has never employed its process for the recall of citizens for religious or political reasons or to bring back absent citizens for military service. These functions are so self-evidently non-judicial that argument which implies their presence in the Act also implies the Act's unconstitutionality.

But the Act makes it clear that Congress legislated with respect to judicial process. The petition for a subpoena must make "proper showing" for the need of the desired testimony at a judicial hearing—the trial of a criminal case (Act, sec. 2). The court's decision as to whether it will authorize the issuance of a subpoena is necessarily judicial and is limited to the consideration of that which appears in the petition. The term "sub-

poena'' connotates judicial process. The subpoena, when it issues, is a judicial command to the absent person to appear in a court at a judicial trial and give his testimony (Act, sec. 2). The punishment procedure is judicial, is to punish the failure of the witness to appear and testify at a judicial proceeding as commanded in the subpoena (Act, sec. 7).

In a word, the procedure under the Act, from the beginning to the end, concerns itself exclusively with judicial procedure, which excludes any notion that it has anything to do with the enforcement of a legislative power of recall.

Furthermore, the reports and debates preceding the enactment of the Act deal with the desirability of such legislation for the purpose of securing desired testimony in civil and criminal cases. There is nothing in the history preceding the enactment of the Act to show that the purpose was to delegate to the Federal judiciary the exercise of the legislative power of recall. See Report of the Chairman of the House Committee on the Judiciary (Rep. No. 1313; 69th Cong. 1st Sess.).

English extra-territorial exercise of the power of recall. The Bartue and Knowles cases.

The cases of *Bartue and Duchess of Suffolk,* (1559) 2 Dyer's Reports, 176-b, 73 Eng. Rep. (Full Reprint), 388, and *Knowles* v. *Luce,* (1579) Moore 109, 72 Eng. Reprint (Full Reprint) 473, declared the ancient prerogative of the English sovereign recognized by English common law and statutes of Parliament, to recall absent English citizens. *Knowles* v. *Luce, supra,* (72 Eng. Rep., Full Reprint 473, 474).

The exercise of this power by a personal sovereign was not judicial. The contempt was contempt of the Queen. The purpose of the recall was political and religious. In those days the Exchequer Courts declaring the contempts were in the nature of personal agents of

the Sovereign, primarily interested in the management and collection of the royal revenue. *Cooley's Blackstone* Book 3, Chap. 4, p. 44.

Whatever may have been or may now be the common law of England on the reach of personal process in connection with the political power of recall or judicial proceedings, it cannot have the slightest relevancy here, for, as we have seen, the common law of this country from the beginning required territorial service of process or voluntary appearance for judicial jurisdiction *in personam. Robertson* v. *Railroad Labor Board,* 268 U. S. 619.

It may be added that although the English sovereign and Parliament were supposed to conform to the Law of the Land, yet, if they failed to do so, there was no relief for the citizenry of those days except by resort to arms or to the block.

Coke says:

> (*Coke's Fourth Institutes,* 4th part, p. 36) "Of the power and jurisdiction of the parliament, for making laws in proceeding by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds."

Blackstone says:

> (*Blackstone: Commentaries*—Cooley, 1884—vol. I, p. 91) "But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature which would be subversive of all government * * *. But if we could conceive it possible for the Parliament to enact that he should

try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature * * *".

There is no question that Blackstone's statement is the law of England at the present time. *Mott's Due Process of Law*, p. 56. In the colonies the doctrine that whatever Parliament declares is the law of the land continued to be the center of attack up to 1776. *Mott's Due Process of Law*, p. 136.

We can derive no valid precedents from jurisdictions where the legislature is omnipotent and its actions are beyond the challenge of judicial due process.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights which were limitations upon all the powers of Government, legislative as well as executive and judicial. *Hurtado* v. *People of California*, 110 U. S. 516, 531, 532. *Charles Warren: Congress, the Constitution and the Supreme Court.* Preface, p. VI: "The authority of the constitutions over governments, and the sovereignty of the people over constitutions, are truths, which are at all times necessary to be kept in mind."—(*James Madison.*)

The irrelevancy of common law Conflicts in relation to appellee's doctrine of jurisdiction in personam by virtue of sovereign control.

Appellee expands its treatment in its earlier brief before this court, of the doctrine of sovereign control with citations of authorities on Conflict of Laws, Private International Law and Removal of Judgments (A. B., pp. 39-41).

Typical of these citations is that of the "Proposed Final Draft No. 1 on the Law of Conflict of Laws", by the American Law Institute.

The following is excerpted (A. B., pp. 39-40; Restatement, p. 114):

> "Section 85. *Individual domiciled within the state.* A state can exercise through its courts jurisdiction over an individual domiciled within the state, although he is not present within the state."
>
> "Section 86. *National of the state.* A state which in the law of nations has standing as a nation can exercise through its courts jurisdiction over its nationals, although they are not present or domiciled within the state."

We pass *Section 85* relating to the exercise of jurisdiction over a "person domiciled within the state" for, as we have seen, neither the Walsh Act nor the Government in the cases at bar takes account of the domicile of the absent citizen (A. B., p. 15).

The first blush relevancy of *Section 86* vanishes when it is remembered that the Conflict of Laws is a part of the common law and disappears when in collision with opposing constitutional principles.

Final Draft No. 1 of the Restatement makes this very clear:

> (p. 21) "Section 5. Legal Nature of Conflict of Laws. *Conflict of laws is a part of the common law, and as such is as binding upon the courts as any other parts of the law of the state.*
>
> "*Comments:* * * * d. *The principles of Conflict of Laws are subject to change only as the principles of other parts of the law are changed, namely, by constitutional* or statutory provisions or treaties or by such gradual changes in legal thought as modify the principles of the common law."

With constitutional principles out of it, there is nothing left to overcome (in a purely domestic case not involving a foreign judgment) the nation's domestic

common law and due process rule that jurisdiction in personam must be acquired by appearance or territorial service of process. *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 622, 623.

The same criticism applies to appellee's other authorities on Conflict of Laws, Private International Law and Removal of Judgments (A. B., p. 41).

Furthermore, *Grubel* v. *Nassauer*, 210 N. Y. 149, and *Smith* v. *Grady*, 68 Wisc. 215, the only American removal of judgment cases cited in the supporting commentaries (to Restatement No. 2) both flatly oppose the Reporter's theory.

This conflict in the subjects of Conflicts and Removal of Judgments is not confined to the *Restatement*. *Freeman on Judgments* (4th ed), recognizes this when he says:

> (par. 570) "In relation to the extraterritorial effect of a judgment procured against a person in *the state of his domicile*, in an action in which he entered no appearance, and in which the process was served constructively, in accordance with the laws of that state, *radical and irreconcilable differences of opinion exist.*" (Our italics.)

Moreover, as has been noted from this excerpt, and as we shall now make additionally clear, the elements of domicile, and mere temporary absence, are essential to the validity of the alleged common law doctrine of Conflicts (aside from constitutional limitations) permitting territorial exercise of jurisdiction over absent citizens by virtue of allegiance.

Black on Judgments (2d. ed) says:

> (par. 227) "Every sovereignty has plenary control over its own subjects, and it may authorize a judgment to be rendered against one of its citizens, upon constructive notice only, and *although he is temporarily absent from its dominions* • • •" (Our italics.)

The editor of *L. R. A.* in his note on *Grubel* v. *Nassauer*, supra, 210 N. Y. 149, 103 N. E. 1113 (Ct. of Appls., 1913), says:

> (L. R. A. N. S. Vol. 52, p. 1914) "As shown in the note to Pinney *v.* Providence Loan & Invest. Co. 50 L. R. A. 577, it is established by the great weight of authority that a court of one state or country will not recognize or enforce a judgment in personam rendered in another against a non-resident upon constructive or substituted service of process without appearance; and, although there was formerly a misapprehension on this point, it is now settled that such a judgment rendered by a state or Federal court is contrary to due process of law, and invalid even in the state where rendered. *These principles would seem to apply to and govern Grubel* v. *Nassauer, unless the bare fact of citizenship in the country where the judgment was rendered may be regarded as a sufficient basis for the recognition extraterritorially of a judgment in personam upon constructive service against one whose domicil and residence were elsewhere.* While there are expressions in some of the cases cited in the note in 50 L. R. A. 585, and also in the note in 35 L. R. A. (N. S.) 225, that might seem to lend color to that view, *it will be observed that the courts were dealing with cases where the defendant was not only a citizen, but a resident of the state or country in which the judgment was rendered, although he may have been temporarily absent therefrom at the time. In such cases, that is, when the judgment defendant is a resident of the state or country in which the judgment is rendered, there is, as shown in the note to Raher* v. *Raher*, 35 L. R. A. (N. S.) 292, *some conflict of authority as to the validity of a judgment in personam upon constructive or substituted service.* Grubel *v.* Nassauer, however, was not such a case, as the judgment defendant, although a citizen of Bavaria, where the judgment was rendered, was a resident of and domiciled in New York." (Our italics.)

We repeat the Walsh Act does not depend upon the domicile of the citizen or his temporary absence. Appellee admits this (A. B., p. 15).

In addition, the common law rule of Conflicts as interpreted by the Reporter in *Section* 86, above excerpted, is limited to states which, in the law of nations, have standing as nations. Where does this leave appellee, which primarily relies on *Mabee* v. *McDonald,* 107 Texas 139, 175, S. W. 676, and *In re Hendrickson* (So. Dak.), 167 N. W. 172, which originated in jurisdictions which do not have international standing as nations?

We regret that the *Harvard Law Review* finds itself in disagreement (A. B., p. 40) with *Grubel* v. *Nassauer, supra,* 210 N. Y. 49, which followed *Pennoyer* v. *Neff,* 95 U. S. 714, 727, in preference to jurisdiction by virtue of sovereign control.

The *Michigan Law Review,* vol. 30, pp. 137-142, (A. B., p. 41) reviews the decision of the court of appeals in the cases at bar and concurs with the opinion of that court. The argument is much the same as that of appellee and we shall not give it separate attention, except to say that the author seems oblivious to the fact that this court has had considerable to say on *the relationship of due process to the root principle* that "no state can exercise direct jurisdiction and authority over persons or property without its territory," and that this principle of due process has been applied to absent citizens of the states and of the United States. More careful analysis of cases like *Toland* v. *Sprague,* 12 Peters, 300; *Picquet* v. *Swan,* 5 Mason 35; *Cooper* v. *Reynolds,* 10 Wall. 308; *Pennoyer* v. *Neff,* 95 U. S. 714 (which at page 762 in referring to *Cooper* v. *Reynolds, supra,* expressly stated that the rule applies whether the absent person is a citizen or a non-resident); *Robertson* v. *Railroad Labor Board,* 268 U. S. 619; *McDonald* v. *Mabee,* 243 U. S. 90,—all dealing with absent citizens might have illuminated the real issues involved. More

attention also to the *due process* rule that jurisdiction in personam *must be acquired* by territorial service of process or voluntary appearance—*Robertson* v. *Railroad Labor Board,* 268 U. S. 619; *Pennoyer* v. *Neff,* 95 U. S. 714; *Boswell's Lessee* v. *Otis,* 9 How. 336; *In re Johnson,* 167 U. S. 120; *McDonald* v. *Mabee,* 243 U. S. 90; *Herndon* v. *Ridgeway,* 17 How. 424; *Michigan Trust Company* v. *Ferry,* 228 U. S. 346; *Baker* v. *Baker,* 242 U. S. 394; *Goldey* v. *Morning News,* 156 U. S. 518; *Insurance Co.* v. *Bangs,* 103 U. S. 435; *Galpin* v. *Page,* 18 Wall. 350; *Wilson* v. *Seligman,* 144 U. S. 41—, might have added something of value to the point now at issue—the validity of a subpoena served extraterritorially without reference to territorial residence or domicile, and designed to command the purely personal testimony of an absent citizen.

The constitutional invalidity of jurisdiction in personam by virtue of sovereign control.

Coming to the constitutional aspects of the doctrine of jurisdiction in personam by virtue of sovereign control. It has been made clear in our earlier briefs before this court that in our opinion the doctrine advanced in *Mabee* v. *McDonald,* 107 Texas 139, 175 S. W. 676, is completely destroyed by *McDonald* v. *Mabee,* 243 U. S. 90, a due process Fourteenth Amendment case.

Appellee, of course, takes issue and opens its discussion of the proposition to which it cites the case (A. B., 50) with the statement—

> "We gather implied authority from the decision of the court in this case for the validity of extra-territorial service upon absent citizens for a judgment in personam * * *."

After commenting on *Mabee* v. *McDonald* (A. B., 50) appellee makes the inexplicable, unfounded statement that this court reversed the Texas Supreme Court on the ground that Mabee was not a citizen of Texas at the time of the commencement of the suit in question.

There is not the slightest doubt as to Mabee's Texas citizenship. His intention to take up his citizenship and domicile in another state was unexecuted. This court said:

> (243 U. S. 91) "When the former suit was begun (the suit in question) the defendant Mabee was not domiciled in Texas but had left the state with intent to establish a home elsewhere. His family, however, still resided there. He subsequently returned to Texas for a short time and later established his home in Missouri" (Our parenthesis).

Appellee has already educated us that:—

> "The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign" (A. B., p. 20—from *Carlisle* v. *U. S.*, 16 Wall. 147).

Appellee then takes that part of the opinion of this court which carries the suggestion that in view of Mabee's domicile in the State of Texas, summons left at his last and usual place of abode might have been enough and deduces the following:

> (A. B. p. 53) "First, it recognizes that jurisdiction may be acquired over non-residents in other ways than by personal service within the territorial limits of the state or by appearance. This statement construed in the light of the opinion of the Supreme Court of Texas implies recognition of jurisdiction by virtue of the allegiance due from a citizen provided there is a foundation of physical power. We have shown that physical power, *coercive power*, exists in the case of citizens in four respects at least. Second, the language of Mr. Justice Holmes indicates that a summons left at the last and usual place of abode would have been enough because it is a method of substituted service most likely to reach the absent defendant. In

other words the notice, even though as far as the officials are concerned, is delivered within the territorial limits, is calculated to be forwarded and actually received outside of the territorial limits. *Substituted service is deemed personal service.*" (Our italics).

Neither of the two branches of appellee's statement is supported by the case. The first confuses the power to coerce with the power to seize the person. Both require the territorial exercise of power. The difference is in this: territorial coercion may be applied (if constitutionally applied) in the absence of citizens, whereas territorial seizure of the person, of course, requires the person's physical presence, or a reasonable theory which assumes his physical presence. The Walsh Act excludes the fact and all theories of physical presence by confining its operation exclusively to persons "beyond the jurisdiction of the United States."

Then there is the additional error of implying jurisdiction by virtue of allegiance "provided there is a foundation of physical power." Clearly, if there is a foundation of physical power (different from the power to coerce) jurisdiction by virtue of allegiance is unnecessary. Seizure of the person (or its civilized equivalent, territorial service) will meet the full initial jurisdictional requirement of due process.

The second branch of appellee's statement, above excerpted, is equally and patently off point. It argues *territorial domicile* and *territorial service* of substituted service, *which appellee advises us is deemed to be personal service.*

We have already shown that the Act does not contemplate service of either summoning process or of a notice (however it may be viewed) within the territorial jurisdiction of the United States, and that the Act takes no account of the domicile or residence of the absent citizen. This is conceded by appellee (A. B., p. 15).

The opinion of the Texas Supreme Court and Mabee's brief before this court, and we assume, the argument squarely presented the question whether sovereign control could substitute for the due process rule that jurisdiction *in personam* must be acquired by voluntary appearance or territorial service of process. *Mabee* v. *McDonald,* 107 Texas 139, 173-174 (175 S. W. 676); brief for defendant in error (in *McDonald* v. *Mabee*) page 7, vol. 57, Collected Briefs; See also our first brief, pp. 26-27).

The contention was based upon Mabee's status as a citizen of Texas, which status, as above pointed out, was inescapable from the facts of the case. Nevertheless, this court held that jurisdiction is power (the power to seize the person—*Michigan Trust Co.* v. *Ferry,* 228 U. S. 346, 353), and substitute methods for acquiring it must keep close to this basic principle of due process.

The direct control over the citizen from the power to seize and the remote extra-territorial control argued from jurisdiction by virtue of allegiance, are self-evident incongruities which cannot live together. The choice by this court, in *McDonald* v. *Mabee,* of jurisdiction through the power to seize the person leaves appellee's opening statement (A. B. 50) that this court impliedly approved extra-territorial service of personal summoning process, without a vestige of support.

Applying principles of the case to the cases at bar, it is at once perceived that everything done here is condemned. No substitute service of the subpoena was made upon appellant in the United States; there was no publication here of the subpoena; appellee had given up his domicile and residence in the United States two years before the Walsh Act was passed, approximately three years before the subpoenas were served in *200* and approximately four years before the subpoena was served in *201;* appellant never returned to this country (R. 200, pp. 18-19; R. 201, pp. 16-19). Appellee declined a tender

of the issue of appellant's domicile (R. 201, pp. 17-18), and admits, in its latest brief, before this court, that under the Act the domiciliary status of the absent witness is of no importance (A. B., p. 15).

The sole remaining question under the Act and under the procedure in the cases at bar then is: did the Government, in the absence of treaty, have the power to seize the witness "beyond the jurisdiction of the United States"? Appellee does not contend there is such power.

Appellee's South Dakota case.

Under the heading "Citizenship supports jurisdiction *in personam* upon extraterritorial personal service only" appellee (A. B., p. 56) cites *in re Hendrickson,* 167 N. W. 172 (1918), a South Dakota case which squarely holds that jurisdiction in personam, when authorized by statute, may be acquired by extra-territorial service of process.

In our previous reply brief we pointed out that the South Dakota Court based its decision on the doctrine of sovereign control, which it took from the reversed case of *Mabee* v. *McDonald* (our first reply brief, pp. 12-14). We pointed out that although decided a year after this court's decision in *McDonald* v. *Mabee,* the fact that no reference was made to the latter decision indicates that it was not brought to the attention of the South Dakota court. We also showed, by excerpt from the case of *Mabee* v. *McDonald,* that the doctrine of sovereign control was not intended to cover the extra-territorial exercise of power, and that the reason is apparent from the fact that the doctrine of sovereign control is an invention designed to circumvent the prohibition on extra-territorial exercise of power (our first reply brief, page 13).

Appellee's direct American authority for the acquisition of judicial jurisdiction *in personam* by virtue of sovereign control rests then on a trilogy of curious

and most unacceptable precedents—the genesis of the doctrine was in a dissenting opinion (*Raher* v. *Raher*, Iowa, 129 N. W. 494),—its fullest development was in a reversed opinion (*Mabee* v. *McDonald*, 107 Texas 139, 175 S. W. 676)—its last expression was in an opinion showing ignorance of the fact that the doctrine had predeceased it (*In re Hendrickson, supra*, So. Dak. 167 N. W. 172).

We close this branch of the subject by inviting attention to the facts which to us seem conclusive—(a) the Act does not base its powers upon allegiance, for it applies equally to *absent* aliens who owe no allegiance, and (b) the territorial principle applies to the United States government when it seeks to compel testimony of a citizen under an Act of Congress (*Robertson* v. *Railroad Labor Board*, 268 U. S. 619), from which it also follows that allegiance is not a valid jurisdictional factor in the similar matter before us.

Appellee does not meet the cases of this court relied upon by appellant.

We have already discussed appellee's analysis of *McDonald* v. *Mabee*, 243 U. S. 90; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619; *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346 (this brief, pp. 11-15, 24-28). Appellee discusses other decisions of this court, also relied upon by us (A. B. pp. 56-69). The inadequacy of its treatment of these cases is illustrated by the fact that it nowhere considers the force to be attributed to the declaration of this court in *Toland* v. *Sprague*, 12 Peters 300, that it could not be in the contemplation of Congress to authorize the extra-territorial service of process, or to the declaration of this court in *Pennoyer* v. *Neff*, 95 U. S. 714, that

> (p. 726) "The fact that the defendants in that case (*Cooper* v. *Reynolds*, 10 Wall. 308) had fled from the state or had concealed themselves, so as

> not to be reached by the ordinary process of the court, and *were not non-residents* was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court; and the grounds and extent of the authority over persons and property were considered, when they were not brought within the jurisdiction by personal service or voluntary appearance * * * to the doctrine declared in the above citation (from *Cooper* v. *Reynolds, supra*) he (Mr. Justice Field) agreed, and he, (Mr. Justice Field) may add that *it received the approval of all the judges.*" (Our italics and parenthesis),

or to the root principle which was made part of due process by *Pennoyer* v. *Neff, supra,* "that no state can exercise direct jurisdiction and authority over persons or property without its territory" or to the numerous other decisions of this court which in one form or another applied the root principle to Federal judicial districts, to the states, to the United States, to foreign countries, to absent citizens and to absent non-resident (our first reply brief, p. 18).

Its discussion of *Johnson, in re,* 167 U. S. 120, cited by us, among other cases, at page 25 of our first brief, in support of the proposition that "jurisdiction *in personam* is 'acquired' either by voluntary appearance, or service on the person within the territorial jurisdiction of the court" is typical. Appellee states:

> (A. B. p. 69) "Of course where the jurisdiction needed is such as will bring the person to the bar of the court to confront witnesses against him and to receive a sentence of the court, actual physical power over the accused may be necessary."

Is there any difference between the jurisdiction needed to bring a person to the bar of the court to confront witnesses and to bring him to the bar of the court to testify?

Miscellaneous irrelevant matters.

As to appellee's citations (A. B., pp. 20-21) defining the duty of allegiance, such as

Carlisle v. *United States*, 16 Wall. 147;
Minor v. *Happersett*, 21 Wall. 162;
Miller on the Constitution of the United States, pp. 294-295, and

As to its citations of authorities to the point that legislation may affect absent citizens (A. B., 21-30), such as:

Rose v. *Himely*, 4 Cranch 241;
The Appollon, 9 Wheat. 362;
Willoughby on the Constitution, p. 247, sec. 120;
Charles Cheney Hyde: International Law, vol. I, p. 424, para. 240;
Cook v. *Tait*, 265 U. S. 47;
United States v. *Bowman*, 260 U. S. 94.

We pass these with the observation that not one is authority for the extra-territorial exercise of power or for the doctrine of allegiance as a substitute for the acquisition of judicial jurisdiction *in personam* by voluntary appearance or territorial service of process, or for the proposition that a subpoena commanding the testimony of an absent citizen is a mere notice. They all have to do either with the assertion of abstract principles or with territorial exercise of jurisdiction.

Legislation, of course, may be designed to affect absent citizens, but the exercise of the power authorized is confined exclusively within the territorial limits of the nation. This was emphasized in *Rose* v. *Himely*, 4 Cranch 241; *United States* v. *Rodgers*, 150 U. S. 249; *The Hamilton*, 207 U. S. 398; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

For example, had appellee continued with the next sentence of its excerpt from *Rose* v. *Himely*, *supra*, 4 Cranch 241 (A. B. 21) it would have noted:

(p. 279) *"It is not easy to conceive a power to execute a municipal law or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power."* (Our italics.)

The following also appears in appellee's excerpt (A. B.; p. 22) from *Willoughby on the Constitution:*

(p. 247, Sec. 120) "From the viewpoint of international relations, as we have just seen, the law of one state is not permitted by other states to operate outside of the territorial limits of the state which promulgates it, and, therefore, although claiming a legal authority over an individual outside of such limits, a state will not be permitted by other states to exercise it against the consent of the state within whose limits the individual is situated. But that does not render impossible the existence of or invalidate such a claim, for, when, *if ever, such an individual is apprehended within the territory of the state claiming authority over him he may be held responsible for acts committed while abroad.*"

The invalid consular function.

Appellee argues the validity of the consular function under headings including the following:

"There is no allegation or proof by the appellant that France objects to, or the laws of France forbid, service of a subpoena by messenger or by consul." (A. B., p. 88),

and

"Even if the manner of serving the subpoena were contrary to international law or French law, the Walsh Act would not be unconstitutional." (A. B., p. 90).

We agree with both of these assertions. We agree that appellant could not, if he wished to, take advantage

of any injury to France resulting from the operation of the Walsh Act. He makes no such claim. We do not place primary reliance on international law. We have cited international law to show that it accords with our own constitutional law, which, in the last event, must control the question.

As to appellee's main heading—"Service by a consul is valid even if no treaty deals with the subject": Appellee goes on the theory that the service of the subpoena under the Act is a ministerial function; that it is the character of function which is recognized by international law as proper for consuls to perform in the absence of treaties—this by reason of the tacit consent of the foreign nations.

Appellee's own citations show that our consular regulations of 1870 (promulgated by the State Department) permitted the service of process by consuls on the theory that in so doing the consul was acting, not as an agent of the Federal Government, "but simply as a citizen of the United States whose local position and character render him available to his fellow citizens for such services as might have been rendered by a private individual", *that general permission for the performance of this function was withdrawn because it resulted "in the loss of prestige of the official or employee who delivered the documents as well as in the prestige of the consular service generally."* (A. B., p. 85).

The Walsh Act, however, does not authorize the consul to serve the subpoena in a capacity disassociated from his official status (see Act). That the same function might be performed by a private citizen (if it might), through the mails (if it might), by cable (if it might), or by radio (if it might), has not the slightest bearing. The point is not how it might have been done under a different act, but was it done validly—may a consul do it validly pursuant to the Act in question.

The letter of the Honorable, Wilbur J. Carr, Assistant Secretary of State, to counsel for appellee, as ex-

cerpted in appellee's brief (A. B., p. 84), is significant in the following: (a) it expresses the opinion of the writer that foreign governments ought not to object to the service of process on their soil by consuls; (b) no objection has been made in the cases at bar; (c) there was no offence to the dignity or sovereignty of France; (d) the consul did not act as a consul, but as a messenger.

This avoids the constitutional point entirely; expresses a hope, the soundness of which cannot be determined until there is objection by foreign nations, which the Assistant Secretary states has not been made; assumes that the service of the subpoena is the service of a mere notice and thus assumes the main point at issue; overlooks the provisions of the Act which make the service a consular function and not that of a messenger.

It is not convincing to describe as a "messenger" a public official representing the United States government and charged with the duty of delivering the solemn commands of United States courts, of seeking out absent citizens in foreign countries, of carrying, tendering and accounting for substantial cash sums for the witnesses' travel and attendance expenses, and of making valid service of the process and proper returns thereon.

It takes a long course of tacit consent to ripen a principle of international law. The two modern exceptions referred to in appellee's brief, to the general prohibition established by the consular regulations on the service of process are, the service of notice under the Naturalization Act, and the service of subpoenas under the Walsh Act (A. B., 85-86). Neither of these practices have attained sufficient antiquity to mature a custom acceptable to international law, and appellee produces no authority to the contrary. The Naturalization Act was passed in 1906 and the Walsh Act in 1926. The service of subpoenas and of the orders to show cause in the cases at bar represents the only exercise of a consular function under the Walsh Act.

To describe the consular function under the Act as ministerial does not advance the discussion. The great bulk of consular functions are ministerial. If there were occasion to label the consul he might be termed a commercial agent. *The Anne*, 3 Wheaton 435; *Hyde International Law*, vol. I, p. 794. In fact our Federal statutes prohibit our consuls from exercising diplomatic functions (sovereign powers) unless expressly authorized by the President, *U. S. C. Tit.*, 22 sec. 105.

But, assuming for the moment, that the service of the subpoena is a ministerial act. That does not take it out of the treaty making power. The taking of an oath or an acknowledgment, is a ministerial act. As to this, *Hyde* says:

> (*Hyde on International Law*, Vol. I, p. 825) "It is of the highest importance that a consular officer should be permitted to perform certain notarial acts within his consular district. *Numerous conventions to which the United States is a party confer that privilege. According to an agreement of 1910*, consular officers may, 'so far as may be compatible with the laws of their own country, take, at their offices, their private residences, at the residence of the parties concerned, or on board ship, the depositions of the captains and crews of vessels of their own country and all passengers thereon, as well as the depositions of any citizen or subject of their own country.'" (Our italics.)

In discussing the *Act of Congress of August, 1856, Section 24*, now substantially embodied in *Section 1750 of the Revised Statutes*, relating to the crime of perjury by false oaths before United States consuls, John Bassett Moore, in his celebrated "Report on Extra-territorial Crime and the Cutting Case" says:

> (*Foreign Relations* 1887, p. 800) "It is observed that the Act relates solely to certain officers, known to international law, who, *upon recognition and with the consent of the governments of foreign countries*, discharge there the functions of official

> representatives of the Government of the United States. *One of those functions for the performance of the official acts enumerated in the Statute of 1856, namely, the taking of oaths, etc., and the performance of notarial acts, for use in the United States* * * *." (Our italics.)

The activities of consuls, notarial and otherwise, have always been the subject of meticulous definition in the agreements between nations. The consummation of such agreements has occupied the attention of this Government from its beginnings. Thus, for example, in February 1778, we concluded a *Treaty of Amity and Commerce,* with France (*Malloy's Treaties,* Vol. I, p. 468) in which the following appears:

> "The two contracting parties grant mutually the liberty of having each in the ports of the other, consuls, vice-consuls, agents, and commissaries, *whose functions shall be regulated by a particular agreement.*" (Our italics.)

The care with which those functions were defined and limited is illustrated by the *"Convention Defining and Establishing Functions and privileges of Consuls and Vice-Consuls,"* between the United States and France, concluded in November 1788 (the "particular agreement" above referred to) (*Malloy's Treaties,* Vol. I, p. 490).

Art. VIII. of the Convention (p. 494) authorizes the consuls of the two nations to exercise police over the vessels of their respective nations; authorizes them to exercise jurisdiction in civil disputes arising on such vessels; and to carry out those powers, authorizes them to board such vessels; and then, so there might be no possible misunderstanding as to the territorial field for the operation of those functions, this article goes on to say—*"well understood that the functions hereby allowed shall be confined to the interior of the vessels.* * * *"* (Our italics.)

Art. IX. of the Convention (p. 494) permitted consuls of the two nations *to cause* the arrest of the deserting captains of their ships, and the procedure was for them *"to address themselves to the courts" • • • "to demand the said deserters in writing."* (Our italics.)

We have examined every consular convention and treaty to which the United States is a party, reported in Malloy's Vols. I and II, and in the supplemental volume III, and find every one of them equally meticulous in defining the exact functions of consuls and the place where they may be performed.

Congress has been equally meticulous in conforming its legislation with respect to consular functions to existing or possible future treaties. Thus, on April 4, 1792, Congress passed—

> *"An Act to carry into full effect the Convention between the Kingdom of the French and the United States, entered into for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls."* (Our italics.)

We excerpt the following from this Act which demonstrates that ministerial functions were the subject of the Convention referred to:

> "And where by any article of the said Convention, consuls and vice-consuls of the Kingdom of the French, are entitled to the aid of the competent executive officers of the country in the execution of any precept, the marshals of the United States, and their deputies, shall, within their respective districts be the competent officers, and shall give their aid according to the tenor of the stipulations.
>
> • • • • • • • • •
>
> Sec. 2. Be it enacted by the authority aforesaid, that they shall have the right in the ports or places to which they are or may be severally appointed, *of receiving the protests or declarations,* which such captains, masters, crews, pass-

engers and merchants as are citizens of the United States, may respectively chuse to make there; * * * and the copies of said act duly authenticated by said consuls or vice-consuls, under the seal of their consulates, respectively, shall receive faith in law * * * it shall be their duty where the laws of the country permit, *to take possession of the personal estate left by any citizen of the United States,* other than seamen belonging to any ship or vessel who shall die within their consulate; * * * *they shall inventory the same;* * * * *shall collect the debts due to the deceased;* * * * *shall sell at auction* after reasonable public notice such part of the estate as shall be of a perishable nature; * * * *shall also, as soon as may be, transmit to the Secretary of State an inventory* of the effects of the deceased taken as before directed.

And be it further enacted, that the said consuls and vice-consuls, in cases where ships or vessels of the United States shall be stranded on the coasts of their consulates, respectively, shall * * * *take proper measures* * * * *for* * * * *saving the said ships or vessels,* and cargoes and appurtenances, as *for storing and securing the effects* and merchandise saved, and for taking an inventory * * *." (Our italics.)

As to judicial jurisdiction exercised by consuls: turning to *Title 22* of the present *United States Code* dealing with Foreign Relations, it will be noted that the preamble of Chap. 2 on "Consular Courts", states:

Sec. 141—Judicial authority generally—

"*To carry into full effect the provisions of the treaties* of the United States with certain foreign countries, * * *"

Sec. 143 (tit. 22, U. S. C.) states:—

"Such officers are also invested with all the judicial authority *necessary to execute the provisions of such treaties,* * * *"

Sec. 146 (U. S. C. tit. 22) commences:—

> "In order to organize and carry into effect the system of jurisprudence *demanded by such treaties, respectively,* * * *"

Sec. 163 (U. S. C. tit. 22), commences:—

> "The jurisdiction *allowed by treaty to the ministers* * * *"

Sec. 177 (U. S. C. tit. 22) states:

> "The provisions of this Chapter relating to the jurisdiction of consular and diplomatic officers * * * shall extend to any country of like character *with which the United States may, after July 1870, enter into treaty obligation.* And whenever the United States shall negotiate *a treaty* with any foreign government, *in which the American Consul General or Consul shall be clothed with judicial authority* * * * etc."

Sec. 191 (U. S. C. tit. 22):—

> "A Court is hereby established * * * which shall have exclusive jurisdiction in all cases * * * whereof jurisdiction may have been exercised * * * by United States Consuls * * * *by law and by virtue of treaties between the United States and China.*"

The long established use of treaties to authorize the exercise of limited and exact consular functions, whether administrative or otherwise, and auxiliary legislation with respect thereto in itself confesses their necessity, and affords a practical and contemporaneous legislative and executive interpretation of the constitutional limitation here contended for on the extra-territorial exercise of official authority. If there were doubt as to the constitutional necessity of treaties to authorize the consular functions prescribed in the Act, this contemporaneous and practical construction by the Executive and Legisla-

tive branches of the government would settle the construction in favor of the necessity. *Knowlton* v. *Moore*, 178 U. S. 41; *McPherson* v. *Blacker*, 146 U. S. 1; *Cooley* v. *Board of Wardens*, 12 How. 299; *Stuart* v. *Laird*, 1 Cranch 299; *Minor* v. *Happersett*, 21 Wall. 162.

We are content with the declaration of this court in *In re Ross, Petitioner*, 140 U. S. 453, that:

> (p. 462) "The Constitution can have no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority *of any kind* in another country it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other."

The breadth of this language covers the consular function, no matter how it may be described.

Since the valid consular function, under our Constitution, must be authorized by treaty, it follows that the Walsh Act, which is not auxiliary to treaties existing or prospective, violates the treaty-making power provided in Art. II, Sec. II, Cl. 2 of the Constitution and is void.

Summary.

At the outset we excerpted appellee's admissions that under the Constitution judicial power cannot be exercised extra-territorially without the consent of treaties (this brief, pp. 3-4). Appellee undertook its necessary correlative burden of showing that the service of the subpoena is the service of a mere notice, and does not involve extra-territorial exercise of power.

> *We think we have now demonstrated that no branch of appellee's argument can be sustained;*
>
> *that the Act, in derogation of the common law, therefore, to be strictly construed, does not support appellee's theory, but on the contrary makes it clear that the subpoena is the command of a*

Federal court, the validity of which depends entirely upon its actual extra-territorial service;

that appellee's rem and quasi in rem cases are inapplicable because the Walsh Act does not contemplate the seizure of property, or of a status or res to be litigated, as a condition precedent to the service of the subpoena, and that there is no status or res which can be affected by any judgment of the court in the subpoena procedure;

that appellee's implied consent cases are inapplicable because they contemplate territorial service of the summoning process upon the defendant's agent within the territorial jurisdiction, whereas service of the subpoena under the Walsh Act is confined exclusively to points "beyond the jurisdiction of the United States";

that its domicile cases are inapplicable because they assume the presence of the defendant within the state and require territorial domicile, and territorial service, constructive or substituted, whereas the Walsh Act takes no account of the citizen's domicile, and exclusively applies to service of process and to persons "beyond the jurisdiction of the United States";

that the doctrine of recall cannot change the subpoena into a notice because that power, to the extent which may be constitutionally delegated (if at all) to the judiciary, becomes to that extent judicial and must be limited in its execution by the established rules of due process governing the service of a judicial summons in personam;

that Conflicts, Removal of Judgment, and Private International Law authorities are inapplicable because they are in conflict among themselves, and because they take no account of domestic constitutional principles;

that English authorities as precedents for the extra-territorial service of process based upon English common law are inapplicable because we have our own common law which is committed to the territorial principle, and because the rules of judicial due process of this nation cannot be affected by precedents illustrative of the unbridled power of the omnipotent English Parliament be-

yond the challenge of English courts or English citizens;

that the doctrine of sovereign control as a basis for the acquisition of judicial jurisdiction in personam has been rejected by this court in a case where it was squarely raised, was not considered in another case involving the reach of Federal process where Congress made it the citizen's duty to testify, and because the doctrine from its very nature is antithetical to that which this court has declared is necessary,—the existence of the power to seize the person;

that this court has held and practice shows that all valid consular functions must be authorized by treaty; that the act is not in aid of treaties.

Appellant's position.

We confidently return to our own position that under the Walsh Act the service of the subpoena by a United States Consul violates the treaty-making power provided by the Constitution; is an extra-territorial exercise of power, which, because it is unauthorized by treaty, cannot be reconciled with the constitutional status of the nation as an equal sovereignty, and is condemned by the law of judicial due process that jurisdiction *in personam* must be acquired; that it can only be acquired by territorial service of process or by voluntary appearance.

REPLY B

The Act does not provide valid jurisdiction to punish.

Appellee advances a new theory on jurisdiction for the punitive procedure. In the Court of Appeals it argued that it is *quasi in rem.* (Its brief there, pp. 55, 86). In its first brief here, it argued that the procedure is *in rem* or *quasi in rem.* (Its first brief here, p. 25). Now appellee says the method of acquiring jurisdiction to try the criminal contempt action and to pass judgment therein is

"double barreled", that it is *quasi in rem* or *in personam*. Thus we have a new mongrel of the law which at one and the same time is three different things, *in personam*, *in rem* and *quasi in rem*.

The Act contemplates *quasi in rem* procedure to try the offense and pass judgment thereon, because:

1. There is no mandatory requirement that the defendant shall be served with the citation to appear.

2. There is no requirement that the service of the citation must be proved.

3. A judgment under the Act may be had "upon service by publication only" (Act, sec. 8).

4. The Act makes attachment of property followed by publication of the citation a mandatory condition precedent to punitive procedure. There is no provision for forwarding the order to show cause for service, or for publishing the order to show cause, until after the Marshal has made a levy on property (Act, sec. 6).

5. The trial is on the issue of criminal contempt and has no bearing on property questions (Act, sec. 7).

Appellee promises to demonstrate that the Act contemplates an *in personam* method of acquiring personal jurisdiction (A. B., p. 95). The promise does not materialize. It is stated that *Section 5* is "permissive" (A. B., p. 96), but that means nothing more than that which is clear from the language of the section, that the court may or may not elect to proceed with the punishment procedure.

Appellee fears that if the method of acquiring jurisdiction is *quasi in rem*, a recusant witness "could avoid punishment by the simple expedient of removing his property from the United States and returning home where no consul could serve him" (A. B., p. 96). If this alarm could materialize, it would only represent an additional disability resulting from the extraordinary device of making the seizure of property a condition precedent to punishment for a criminal offense.

Appellee urges that "criminal contempt is not a crime within the *6th Amendment,* or common understanding, but is *sui generis* (A. B., p. 99). We have not said that criminal contempt is a crime *within the 6th Amendment,* and we have not denied that *inherent power* contempt cases are *sui generis.* We do not care whether the offense under the Act is called a crime or a criminal offense. It is certainly the latter. This court has said so. *Michaelson* v. *United States,* 266 U. S. 42, 66-67; *Ex parte Grossman,* 267 U. S. 87, 116.

Appellee argues that since criminal contempt proceedings are *sui generis* no fixed formula of procedure is necessary under the Constitution (A. B., p. 96). We do not say that a fixed formula of procedure is necessary for *inherent power* contempt cases. We *do* say that when a special statute in derogation of the common law fixes the formula it must be judged in accordance with its terms. *Galpin* v. *Page,* 18 Wall. 350, 367, 370, 371, 372. "Under the assumption of a special power it cannot be made general by any supposed necessity, beyond the provisions of the Act." (*Boswell's Lessee* v. *Otis,* 9 How. 336, 349).

Proceeding further, appellee states:

> (A. B., p. 97) "The procedure for acquiring jurisdiction may be *quasi in rem* and the incidents, so far as matters of formality are concerned, may be interpreted according to principles applicable to such *sui generis* proceedings."

We are not discussing "incidents" or "matters of formality". The matter for consideration is whether the acquisition of jurisdiction to punish criminal contempt of court by a specified *quasi in rem* method is valid under the Constitution.

In the next sentence appellee says:

> (A. B., p. 97) "The act is declaratory of inherent power of Federal courts, *except so far as novel procedure is* expressly prescribed." (Our italics.)

The validity of the "novel procedure" is the precise point at issue—not the inherent power of Federal courts.

Appellee continues to destroy the relevancy of its arguments with the following:

> (A. B., p. 117) "* * * that the Walsh Act is declaratory *except as it extends the jurisdiction of the court and regulates procedure;* that established principles of jurisdiction and practice may prevail *except as modified by the Act,* and that *except as modified by the Act,* no fixed formula of procedure is necessary. It is sufficient that the procedure, as regulated by the Act, does not deny due process. There is nothing in the nature of the offense which precludes the use of *quasi in rem* procedure." (Our italics.)

We agree that the procedure must not deny due process. It denies due process because the offense is personal, the charge is personal, the issue is personal, the judgment is personal, and the *quasi in rem* procedure, attempting, as it does, to acquire jurisdiction of that which is truly *in personam,* violates the requirement of due process of territorial service or voluntary appearance. *Pennoyer* v. *Neff,* 95 U. S. 714.

The theory apparently is that because inherent power contempt cases are *sui generis* with certain relaxations in procedure, that everything that may be done, including that which may be done by Congress with reference to the subject of contempt, is permissible. This, of course, is not correct. It argues out of existence all due process protection in connection with the offense.

Even inherent power contempt cases are *sui generis* only to the extent that courts have found it necessary to make them so in order to protect their very existence. *Michaelson* v. *United States,* 266 U. S. 42, 65-66; *Ex parte Grossman,* 267 U. S. 87, 117-118.

Federal courts have never found it necessary in the protection of their existence to adopt *quasi in rem* procedure to acquire jurisdiction to punish citizens beyond

the territorial limits of the United States who failed to respond to process. They have uniformly condemned extra-territorial service of process, not only because of constitutional limitations, but on principles of common law. *Pennoyer* v. *Neff*, 95 U. S. 714; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619.

Appellee intimates an analogy between the Clayton Act and the Walsh Act (A. B., p. 99). The Clayton Act provided a limited regulation of the inherent power of Federal courts. This court had the Clayton Act before it in *Myers* v. *United States*, 264 U. S. 95. The opinion states:

> (p. 103) "To disobey a judicial order is not declared criminal by the Clayton Act. It recognizes that such disobedience may be contempt *and having prescribed limitations, leaves the court to deal with the offender.* * * *. The Clayton Act says nothing about venue in contempt proceedings; leaves it as theretofore. The power of the court below to issue the enjoining order is not questioned. By disobeying the order, plaintiffs in error defied an authority which that tribunal was required to vindicate. *It followed established practice, as modified by the statute* * * *." (Our italics.)

The Walsh Act, however, provides an entirely new power and a new, express and specific procedure to enforce that power. The power is not inherent, it has never been claimed to be inherent; it is not regulatory of anything inherent; because it is statutory and not inherent it cannot be *sui generis*.

Appellee takes exception to the point we make that despite Federal Conformity Acts this court has refused to permit attachment of property to serve as a method of acquiring jurisdiction *in personam*. The Acts of Congress we have in mind are:

The Act of May 8, 1792, entitled "An Act for Regulating processes in the Courts of the United States * * *"

and The Conformity Attachment Act of June 1, 1872 (c. 255, sec. 6, 17th Stat. 197; R. S. 915; U. S. C. Tit. 28, sec. 726).

Section 2 of the Act of May 8, 1792, is as follows:

> "Sec. 2. And be it further enacted, that until provision shall be made, and except where by this Act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, *and modes of process shall be the same in each state respectively as are now used or allowed in the supreme courts of the same* * * *" (Our italics).

The Conformity Attachment Act of June 1, 1872, (*supra*), provides:

> "In common law causes in the district courts the plaintiff *shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof;* and such district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, or similar security, as required by such state laws, shall be first furnished by the parties seeking such attachment or other remedy." (Our italics).

Despite the existence of these Federal statutes, the language of which seems very clear, this court and the lower Federal courts have continued to rule that attachment cannot be used to acquire jurisdiction *in personam;* that attachment is but an incident of a suit; that unless there is jurisdiction over the person of the defendant, the attachment must fall. See for example: *Toland* v. *Sprague,* 12 Peters 300, 329; *Picquet* v. *Swan,* 5 Mason 35; *Big Vein Coal Co.* v. *Read,* 229 U. S. 31; *Laborde* v. *Ubarri,* 214 U. S. 173.

Appellee does not controvert the holdings of these cases, but says that it would be different if Congress legislated the necessary authority. We answer by inviting attention to the language of the acts of Congress above excerpted.

Appellee again picks up the *dictum* in *Big Vein Coal Co.* v. *Read,* 229 U. S. 31, that:

> (p. 38) "If Congress had intended any such radical change, it would have been easy to have made provision for that purpose and doubtless a method of service by publication in such cases would have been provided."

Mr. Justice Day was referring to actions essentially *quasi in rem.* We think it fair to suggest that if Mr. Justice Day had been thinking of the "radical change" involved in authorizing *quasi in rem* procedure for an action purely *in personam,*—having to do with the punishment of a criminal offense—he would have said so.

Be that as it may, if service by publication under any circumstances to acquire jurisdiction *in personam* were conceivably within the power of Congress to authorize, it would have to adhere closely to the rule of *McDonald* v. *Mabee,* 243 U. S. 90, and *Michigan Trust Co.* v. *Ferry,* 228 U. S. 346, that jurisdiction is the power to seize the person. The procedure would have to be limited to defendants within—and not "beyond the jurisdiction of the United States."

REPLY C

The Act does not provide for notice of the offense or the claim against the property.

Appellee furnishes a handy key to quick solution of the question involved. It states:

> (A. B., p. 129) "Contrary to the assertions of the appellant (B. 34, 35) that special counsel for the

Government in these cases, by the form and conditions of the orders to show cause involved in the cases at bar, interpreted the Act as not requiring notice to the defendant of his alleged offense or of the alleged claims against the property, *we assert that the only proper inference from the form and conditions of the orders to show cause involved herein, is that special counsel for the Government construed them as giving the appellant all necessary notice.*" (Our italics.)

When we know, therefore, the nature of the notice which appellee interpreted the Act to require, we have appellee's interpretation of the Act.

The sole official notice to appellant in both actions was as follows:

(R. 200, pp. 11-12)

"ORDER FOR APPEARANCE, &C.,

Filed November 16, 1927.

* * * * * * * * *

And now, November 16th, 1927, upon consideration of the petition heretofore filed by Peyton Gordon, United States Attorney for the District of Columbia, Atlee Pomerene and Owen J. Roberts, Special Counsel for the United States of America, it is ordered as follows:

1. The said Harry M. Blackmer is hereby directed to appear before this Court on Friday, January 6, 1928, at ten o'clock A. M., to show cause why he should not be adjudged guilty of contempt and be punished accordingly.

2. That the property of the said Harry M. Blackmer within the United States, of the amount and value of $100,000, be levied upon and seized by the Marshal of this Court and held to satisfy any judgment that may be rendered against the said Harry M. Blackmer in this proceeding.

3. That the Marshal of this Court is hereby directed upon making such levy to forward to the Consuls of the United States at Paris, France, at

Nice, France, and at any other places in France or in any other countries where the said Harry M. Blackmer may be, a copy of this order, with the request that such Consul or Consuls make service of the same personally upon the said Harry M. Blackmer; and further that the said Marshal shall cause this order to be published in The Washington Evening Star, a newspaper of general circulation in the District of Columbia once each week for six consecutive weeks, in accordance with the provisions of Section 6, c. 762, of the Act approved July 3, 1926, 44 Stat. 835.

By the Court:

F. L. SIDDONS,
Judge."

(R. 201, pp. 11-12)

"ALIAS ORDER TO SHOW CAUSE.

Filed Dec. 26, 1928.

* * * *

Upon motion of the United States of America, the defendant, H. M. Blackmer, is cited and admonished to appear before this court on the 25th day of February, 1929, at 10 o'clock A. M. and show cause, if any he has, why he the said H. M. Blackmer, should not be adjudged guilty of contempt of court in neglecting, failing and refusing to obey the subpoena heretofore issued by said Court and served upon him to appear before this Court as a witness in the case of the United States *vs.* Harry F. Sinclair and Albert B. Fall, Criminal No. 43,324 on the docket of this Court, the circumstances of which are very fully set out in said motion of plaintiff filed herein and why the said H. M. Blackmer should not be fined and punished therefor according to law.

It is ordered that the Marshal of this District levy upon and seize the property of the said H. M. Blackmer within the United States of the amount and value of One Hundred Thousand Dollars ($100,000.00), or so much thereof as may be found, and hold the same until further ordered by the Court for the purpose of satisfying any judgment

that may be rendered against H. M. Blackmer in this proceeding.

It is further ordered that the Marshal of this District, upon having made such levy and seizure, shall forward to the Consul of the United States at Paris, France, and to the Consuls of the United States at any other place in France or in any other countries where said H. M. Blackmer may be, a copy of this order with a request that such Consuls, or any one of them, shall make personal service thereof upon said H. M. Blackmer and make prompt return thereof to the Clerk of this Court and that said Marshal shall make personal service of this order upon said H. M. Blackmer, if he is found in the United States and make prompt return thereof to the Clerk of this Court, and that said Marshal, upon having made such levy and seizure, shall cause this order to be published in the Evening Star, a newspaper of general circulation in the District of Columbia, once a week for six consecutive weeks, commencing as soon as possible after such levy and seizure and cause the editor or publisher of such newspaper to make due return thereof upon the completion of such publication.

WILLIAM HITZ,
Judge.

Dec. 26, 1928.

Approved:
LEO A. ROVER,
United States Attorney for the District of Columbia.

ATLEE POMERENE,
Special Counsel."

In 200, appellee, therefore, interpreted the Act as requiring nothing more than a bare citation to appear and to answer an unspecified contempt; as not requiring any statement of the charges against appellant's seized property. In 201, appellee interpreted the Act as requiring no more than the specification of a contempt alleged to have arisen from disobeying an undescribed subpoena in

the face of the fact that three subpoenas had been served upon appellant in two different actions, and none of which identified itself with the Act. (R. 200, pp. 7, 9; R. 201, p. 4).

It has been held that a general citation to appear is not notice of the specific object of the inquiry. We refer to *In re Rosser*, 101 Fed. 562 (C. C. of A. 8th Circuit, 1900; Op. by Circuit Judge Sanborn).

Rosser was committed to jail *for contempt of court* for failing to obey the order of a referee in bankruptcy to turn over to the trustee the sum of $2500 alleged to have been a part of Rosser's estate when he was adjudged a bankrupt, and to have been in his possession when the order for him to deliver it to the trustee was made.

The order followed a hearing *to which Rosser had been cited to appear* (and at which he did appear) and be examined under *Section 21* of the Bankrupt Act, which among other things provides,—"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order, require any designated person, *including the bankrupt* * * *, to appear in court or before a referee * * *, *to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of* administration * * *." (U. S. C. tit. 11, sec. 44).

The citation, however, did not inform Rosser that the $2500 matter would be inquired into, although as is evident from the foregoing excerpt from the Bankrupt Act, examination as to the $2500 was clearly within the general scope of permitted inquiries.

Rosser challenged the order of commitment on the ground that the citation to appear did not put him on notice that the proceedings would include examination with reference to the $2500, and *that the denial of such notice was denial of due process.*

The case, therefore, squarely involved the questions whether a general citation to appear without notice of the

specific matter to be inquired into, can be a proper foundation for judgment of guilty of contempt, and correlative to that the question,—What is a sufficient notice?

The Court of Appeals sustained Rosser's contention, vacated and annulled the judgment of contempt and commitment, and in the course of its opinion said:—

> (pp. 567, 568) "The basic principle of English jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law, without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. *The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.* And the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it, if a question of fact is in issue, and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the lives or property of citizens in the absence of such a notice and opportunity to the party affected are violative of the fundamental principle of our laws, and cannot be sustained. *Gentry* v. *U. S.* (C. C. A.) 101 Fed. 51; *Burton* v. *Platter,* 10 U. S. App. 657, 663, 4 C. C. A. 95, 99, 53 Fed. 901, 905; *Windsor* v. *McVeigh,* 93 U. S. 274, 277, 278, 23 L. Ed. 914; *Capel* v. *Child,* 2 Cromp. & J. 558, 574; *Hovey* v. *Elliott,* 167 U. S. 409, 414, 416, 446, 17 Sup. Ct. 841, 42 L. Ed. 215; *Galpin* v. *Page,* 18 Wall. 350, 368, 21 L. Ed. 959; *Underwood* v. *McVeigh,* 23 Grat. 409, 413; *Henry* v. *Carson,* 96 Ind. 412; *Hovey* v. *Elliott,* 145 N. Y. 126, 39 N. E.

841; *Taussig's Ex'rs* v. *Glenn*, 4 U. S. App. 524, 541, 2 C. C. A. 314, 318, 51 Fed. 409, 413; *Merrill* v. *Rokes*, 12 U. S. App. 183, 188, 4 C. C. A. 433, 435, 54 Fed. 450, 452."

* * * * * * * *

(pp. 568, 569) "It is an axiom of pleading and practice that one may not bring a suit for one cause of action and recover a judgment for another, much less may one recover an order or judgment for money and property without any suit or notice of the claim upon which it is founded. *Gentry* v. *U. S.* (C. C. A.) 101 Fed. 51. In the case in hand no notice was given to the bankrupt that any hearing would be had upon any claim that he should be required to pay over the $2,500 in controversy before the order to that effect was made. No order to show cause why he should not pay it was made or served upon him before the absolute order for its payment was presented to him. No opportunity was afforded him to be heard upon the questions it presents. He was cited to appear and be examined under section 21 of the bankrupt act, and his testimony and that of various other witnesses were taken before the referee upon that citation, *but no notice was served upon him that the claim, which culminated in the order for the payment of the $2,500, was made or was in issue at that examination,* or that the testimony there elicited was taken for the purpose of establishing that claim, and no opportunity was presented to him to produce witnesses in his defense or to be heard upon the issues of fact or of law which the issue of the order involved. *Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the questions of law which it involves. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void.*"

(p. 569) *"The fundamental error in all these proceedings is that there was no notice to the bankrupt, either before the referee or before the court, of any hearing upon the claim of the trustee that he had $2,500 of the bankrupt estate in his possession which the trustee asked the referee or the court to order him to pay over, and there was no opportunity for him to be heard upon the questions of fact and of law which that claim presented."* (Our italics).

This court in *In re Wood and Henderson*, 210 U. S. 246 (1908; Op. by Mr. Justice Day), expressly approved the language of Judge Sanborn in the *Rosser* case, *supra*, as follows:

(pp. 254, 255) "The course of legal proceedings necessary to be had to affect private rights is well stated by Judge Sanborn in *Rosser's* case, cited. He says, at page 159, Am. Bankr. R. and page 567, 101 Fed. Rep.:

> 'Such a course must be appropriate to the case, and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained.'"

In *Cooke* v. *United States*, 267 U. S. 517 (1925; Op. by Mr. Chief Justice Taft), it is said:

(p. 536) "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges * * *."

(p. 537) "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, recognizes that the accused should be advised of the charges."

In *Windsor* v. *McVeigh*, 93 U. S. 274 (Op. by Mr. Justice Field), it was said, with reference to charges for the condemnation of property:

> (pp. 279-280) "* * * charges on which the condemnation is sought shall be specific, determinate and clear."

With it in mind that the Walsh Act is in derogation of the common law and must contain all provisions necessary for its complete operation, it is apparent that the foregoing cases defining the requirements of procedural notice, define at the same time the statutory notice which this special act must provide. Provision for a bare citation to appear, as we have seen, from the *Rosser* case, *supra*, is not notice of an offense. And, likewise, a bare citation to appear and defend against an unspecified contempt cannot be construed into a "specific, determinate and clear" charge against seized property.

Appellee criticizes the *Rosser* case, *supra*, on the ground that the Bankrupt Act was not held unconstitutional (A. B., p. 124). Reference to the case will show that Rosser did not attack the constitutionality of the Bankrupt Act. He did not attack the section under which the citation to him was authorized any more than we make specific attack on that part of the Walsh Act. We do not quarrel with the provision requiring a citation to appear; *our point is that the Act does not require notice in addition to the citation to appear.*

Appellee comments on *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, and concludes:

> (A. B., p. 125) "* * * If the Florida statute had provided for a *hearing after notice of the claim* at which the stockholder could show cause why judgment should not be rendered against him, the statute would not have been open to the objection that was sustained."

We are in precise agreement on the interpretation of this case. The Walsh Act does not provide for "notice of the claim".

The necessity for mandatory requirement of notice in special statutes was also emphasized in *Wuchter* v. *Pizzutti*, 276 U. S. 13.

Appellee argues that:

> (p. 125) "When an act of Congress specifies that a particular thing shall be done, such as an order to show cause why a defaulting witness shall not be adjudged in contempt, the Congress need not specify the details of the order. It is entitled to assume that the order will contain all the particulars essential to comply with the Constitution and other laws not inconsistent with the statute."

This might have more force had appellee's practical construction of the Act's requirements been in accord with the principle. As will be observed from the orders to show cause above excerpted, appellee did not consider the Act as requiring the specification of "details" or the "particulars essential to comply with the Constitution".

Moreover, as has been stated, the Act is special, is in derogation of the common law and must contain within itself those provisions necessary for its complete operation. "Under the assumption of a special power, it cannot be made general by any supposed necessity beyond the provisions of the Act". *Boswell's Lessee* v. *Otis*, 9 How. 336, 349; *Galpin* v. *Page*, 18 Wall. 350, 367, 370, 371, 372.

Appellee argues that a citizen is constructively charged with notice and knowledge of the statutes and laws of the land, and, therefore, is constructively charged with knowledge that a subpoena general in form is in fact a special subpoena under a special act (A. B., p. 127). We submit this is patently fallacious. When the special Act fails to provide for identifying itself with subpoenas issued by its authority, it fails to require the essential notice that special and not general law is in operation. General subpoenas, served extra-territorially, can only be given their face value. They are void.

REPLY D

Search and Seizure Authorized by Act Violates the Fourth Amendment.

We have replied to appellee's major contentions (see our first Reply Brief, pp. 35, 38). Appellee adds:

> (p. 131) "The Fourth Amendment *must* be interpreted in conjunction with the clause in the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself." (Our italics).

The decisions of this court, however, establish that all searches and seizures, whether or not for incriminating purposes that "invade the sanctity of a man's home and the privacies of life", that invade "his indefeasible right of personal security, personal liberty and private property where that right has never been forfeited by his conviction of some public offense", and "whether accused of crime or not", violate the protection of the Fourth Amendment. *Boyd* v. *United States,* 116 U. S. 616; *Weeks* v. *United States,* 232 U. S. 383; *Cooley's Constitutional Limitations* (8th Ed.) Vol. I, pp. 610-636.

Appellee's point is met by the language of this court in *Go-Bart Imp. Co.* v. *United States,* 282 U. S. 344:

> (p. 357) "It (first clause of the Fourth Amendment) *is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders, as well as the innocent,* and unquestionably extends to the premises where the search was made and the papers taken. *Gouled* v. *United States,* 255 U. S. 298, 307. The second clause declares: 'and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. This prevents the issue of warrants on loose, vague, or doubtful bases of fact. *It empha-*

sizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty, they are denounced in the constitutions or statutes of every state of the union. *Agnello* v. *United States,* 269 U. S. 20, 33. The need of protection against them is attested alike by history and present conditions. *The amendment is to be liberally construed,* and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States,* 116 U. S. 616, 623. *Weeks* v. *United States, supra,* 389-92. *There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.*" (Our parenthesis and italics.)

Since, however, incriminating searches and seizures have met such uniform and spirited condemnation as violating the protection afforded the citizen by both the *Fourth* and *Fifth amendments,* it is interesting to compare the injury to a defendant in such cases with the injury to a defendant under the Act in question:

(a) In both, the search and seizure may cause invasion of the sanctity of defendant's home, his person, the privacies of his life, his private property, papers and effects, which because he has not been convicted of some public offense, have not been forfeited.

(b) In both cases the motivating impulse of the search and seizure *is to convict the defendant.*

(c) In both cases the defendant is presumed to be innocent.

(d) Both cases are actions *in personam;* neither case involves property disputes; there are no questions as to "offending property", or money claims.

(e) The incriminating seizure may result in conviction; the seizure under the Act in question may also re-

sult in conviction, because without the seizure there could be no trial of the offense.

(f) The incriminating seizure has a closely confined and connected relationship with the object to be attained —evidence; but the seizure under the Act may be *unlimited* and cannot possibly have relationship with the presumption of innocence prevailing at the time it is made, or with the possible fine, which may never be adjudged and which at the time of the seizure could not possibly be determined.

Appellee closes its argument with a broad hint of outlawry which violates the rudimentary conception of the fundamental rights of the citizen. *Hovey* v. *Elliott*, 167 U. S. 409, 444 (A. B., p. 132).

Even under ancient English common law in cases of felony, the property of the defendant could not be forfeited to the Crown until after conviction. This is stated in *The Three Friends*, 166 U. S. 1 (1896; Op. by Mr. Chief Justice Fuller).

> (pp. 50-51) (Quoting from the opinion of Justice Story in *The Palmyra*, 12 Wheat. 1, 14) "It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the Crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part of at least a consequence, of the judgment of conviction. *It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the Crown by the mere commission of the offense, but the right attached only by the conviction of the offender. The necessary result was, that in every case where the Crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction.* But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on *the revenue side of the Exchequer. The thing is here primarily*

considered as the offender, or rather the offense is attached primarily to the thing; and this whether the offence be *malum prohibitum* or *malum in se.* The same principle applies to proceedings *in rem,* on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem,* and there is no accompanying penalty *in personam.* Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. *But the practice has been and so this court understands the law to be, that the proceeding in rem stands independent of, and wholly unaffected by any criminal proceeding in personam.* And see *The Malek Adhel,* 2 How. 210; *United States* v. *The Little Charles,* 1 Brock, 347." (Our italics.)

REPLY E

Act Violates Due Process Because it Authorizes Trial and Judgment in the entire absence of Defendant without his Consent.

Appellee suggests that the holding of this Court in *Ex parte Terry,* 128 U. S. 289, contemplated the necessity of notice prior to trial rather than personal jurisdiction over the defendant at the trial, as contended by appellant. Appellee does not demonstrate its opinion. The case will speak for itself. The stated question in the *Terry* case was:

(128 U. S., p. 311) "Whether the petitioner's retirement from the Court Room into another room of the same building, after he had been guilty of misbehavior in the presence of the Court, and had violently obstructed the execution of its lawful order, defeated the jurisdiction which it possessed, at the moment the contempt was committed, to order his immediate imprisonment, without

other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form?"

In answering this question in the affirmative, this Court said:

(pp. 311-312) "If, in order to avoid punishment, he had absconded or fled from the building, immediately after his conflict with the marshal, the court, in its discretion, and in the circumstances rendered proper, could have ordered process for his arrest and given him an opportunity, before sending him to jail, to answer the charge of having committed a contempt. But in such a case the failure to order his arrest, and to give him such opportunity of defence would not affect its power to inflict instant punishment. Jurisdiction to *inflict such punishment having attached while he was in the presence of the court*, it would not have been defeated or lost by his flight and voluntary absence." (Our italics).

And further (p. 314):

"Nor, in our judgment, is it an accurate characterization of the present case to say that the petitioner's offense was committed 'at a time preceding, and separated from, the commencement of his prosecution'. His misbehavior in the presence of the court, his voluntary departure from the court room without apology for the indignity he put upon the court, his going a few steps, and under the circumstances detailed by him, into the marshal's room in the same building where the court was held, and the making of the order of the commitment, took place, substantially, on the same occasion, and constituted, in legal effect, one continuous complete transaction, occurring on the same day, and at the same session of the court. *The jurisdiction, therefore, of the Circuit Court to enter an order for the offender's arrest and imprisonment was as full and complete as when he was in the court room in the immediate presence of the judges.*" (Our italics).

We submit it is perfectly apparent that the opinion did not concern itself primarily with the necessity of notice; that it did concern itself primarily with the necessity of personal jurisdiction over the defendant.

Merchants Stock & Grain Co. v. *Board of Trade,* 201 Fed. 20 (A. B., pp. 131-134), and the authorities therein referred to, viz., *Ex parte Terry, supra,* 128 U. S. 189; and *Middlebrook* v. *State,* 43 Conn. 257, were all cases involving contempt committed in the face of the Court, in which the defendant was initially present and, therefore, was "in the presence and constructively, at least, in the power of the Court" when sentence was pronounced.

Appellee says that if this Court in *Cooke* v. *United States,* 267 U. S. 517, had intended that the defendant in contempt cases should be personally present, at least at some stage of his trial, it would have said that he should "be brought and held in custody as a criminal" (A. B., p. 135).

The fact is, this Court emphasized that the contemnor "must be brought in". In the *Cooke* case, the first step by the District Court was the issuance eleven days after the alleged contumacy (Case, p. 521) of "an order of attachment and the arrest of the petitioner". The Opinion states:

> "It is not shown that the writ of attachment contained a copy of the order of the court, and we are not advised that the petitioner had an exact idea of the purport of the charges until the order was read. In such a case, and after so long a delay, it would seem to have been proper practice, as laid down by Blackstone, 4 Commentaries, 286, to issue a rule to show cause. * * * *Without any ground shown for supposing that a rule would not have brought in the alleged contemnors, it was harsh under the circumstances to order the arrest.*" (Our italics).

REPLY F

Denial to accused in criminal prosecutions of right to compulsory process.

The first division of appellee's argument is summarized as follows:

> (A. B., p. 139) "We do not deny the appellant's right to challenge the constitutionality of those features of the Walsh Act as have directly affected him, but we contend he has no right to question such features as only could affect Sinclair and Fall or that would not operate to appellant's prejudice. Just as in the Blair & Watson cases, the appellant lacks the capacity to raise this point because he is attempting to assert an alleged defect that only concerned, as a primary right, the defendants in the criminal trial."

Our complete reply to this is:

Section 2 of the Act is unconstitutional because it deprives the accused of his constitutional right to compulsory process, and at the same time impairs appellant's proper liberties as a citizen and starts in motion procedure which denies and impairs his lawful property rights. The section, therefore, directly and adversely affects appellant, not in the precise manner in which the accused in the criminal action is unconstitutionally injured, but by the operation of the precise section of the Act.

As to the necessity for equal compulsory process (A. B., p. 140): In *In re Dillon,* 7 Fed. Cases, p. 710, the Court said:

> (p. 712) "By the ancient rules of the common law, the party accused in capital cases has no right to exculpate himself by the testimony of any witnesses. The injustice of so unreasonable and oppressive a rule induced the courts to relax it, and the practice was gradually introduced of examining

witnesses for the accused, but not upon oath. Sir Edward Coke denounces this practice as tyrannical and unjust, and contended that in criminal cases the accused was entitled to have witnesses sworn for him. It is now in England, by statutes comparatively recent, provided that the accused shall in all cases have the right of having witnesses sworn for him as well as against him. I am not aware that he even yet, in that country, possesses the right to compulsory process to obtain their attendance. The analogous right of the accused to have the assistance of counsel, does not to this day, or did not very recently, exist in England in any criminal cases except indictments for treason. Such was the state of the common law when the provisions giving the accused the right to compulsory process to secure the attendance of his witnesses and the right to have the assistance of counsel, were incorporated into the constitution. They were obviously intended to abrogate the harsh and tyrannical rules of the common law which have been referred to, *and to place the accused in a position to make his defense and establish his innocence, by giving him rights in all respects similar and equal to those possessed by the government for establishing his guilt. If, then, the accused, by virtue of these provisions, enjoys rights equal to those of the prosecution, and stands, with respect to witnesses, on the same footing, with the government, it would seem that the object of the constitution is accomplished.* Such seems to have been the construction given by congress to this provision of the constitution. By section 29 of the crimes act of April 30, 1790, it is provided, 'that every person accused or indicted under that act shall have the like process of the court where he shall be tried, to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on the prosecution against them.' The fact that this act passed by the first congress assembled under the constitution, most of whose members had been members of the convention which framed that instrument, gives to this legislative construction a more than ordinary importance."

We can add nothing to the foregoing, and appellee demonstrates nothing wrong with it.

Appellee argues (A. B., pp. 142-143) that because the requirement for *like process* in the *First Crimes Act* of April 30, 1790 (1 Stat. 118; R. S. Sec. 1034; U. S. C. A. tit. 18, Sec. 563) occurred in a section dealing with treason and capital offenses, Congress did not consider *like process* to be necessary in other kinds of cases. But it would have been entirely gratuitous and most peculiar had Congress expressly prescribed *like process* for all cases within the whole field of criminal law while engaged in drafting a section dealing alone with treason and capital offenses. We think it is clear that the court in the *Dillon* case, *supra,* went on the theory that the members of the First Congress were simply applying to the specific matter before them (treason and capital cases) that which comported with their general conception of what a defendant ought to have in the way of compulsory process in the light of what he did not have under the then existing English common law. That conception was crystallized in the Sixth Amendment which at the time of the enactment of the *First Crimes Act* was in the process of ratification, completed December 15, 1791.

It is said that there are a number of respects in which a person accused of crime has a lesser right to compulsory process than is accorded to the Government (A. B., pp. 143-146), for the reasons that an indigent criminal defendant is given a limited right to process at the Government's expense; that the Government's rights are superior in the matter of the issuance of a recognizance; that the accused can ask for no more than ordinary diligence on the part of the serving officer; that the court has discretion in the matter of granting continuances because of the absence of witnesses; that it is in the discretion of the court whether it will grant a request of an accused for the appearance of a witness confined in

jail or state prison, and that the issuance of a subpoena *duces tecum* is in the discretion of the court.

This is all answered by that which is obvious, to wit, that the Constitution does not guarantee compulsory process *at the Government's expense;* does not guarantee the accused the right to put his witness in jail or in the alternative to compel the posting of a recognizance; does not guarantee extraordinary diligence on the part of the serving officer; does not guarantee continuances. These are all administrative matters. The Government also may suffer from the stupidity or procrastination of serving officers, from the failure to secure requested continuances, or from a court's decision not to allow witnesses to be brought from jail or not to allow subpoenas *duces tecum.*

As to appellee's proposition that under the Act the accused in the criminal case has substantially equal process: We met most of this in our first reply brief (pp. 42-44).

Appellee introduces the suggestion that Federal courts have uniformly issued commissions *dedimus potestatem* to take depositions of absent witnesses in criminal cases under *Section 866, Revised Statutes of the United States.*

Three cases are cited: *United States* v. *Wilder,* 14 Fed. 393; *United States* v. *Cameron,* 15 Fed. 794, and *United States* v. *Sinclair and Fall,* No. 43324 in the Supreme Court of the District of Columbia. In the latter case (*United States* v. *Sinclair and Fall, supra*), the Government and the defendant agreed on depositions, and hence there was no question before the court. In both the *Wilder* and *Cameron* cases, *supra,* the Government resisted the defendant's request for depositions. In the *Wilder* case, *supra,* the Court said:

> (14 Fed. p. 393) "*The application is resisted by the district attorney on the grounds that it is unprecedented, and without authority,* to take the evidence of witnesses in criminal cases by com-

mission, and that the evidence, if taken, would be inadmissible on the trial.

* * * * * * * * *

"Taking evidence in the manner asked in this case may be and *probably is unprecedented in the United States courts in criminal cases,* but I am informed is permitted in state courts of Georgia, and is allowed by statute in other states. * * * *When the evidence is taken* and the case comes on for trial, its scope, force, and effect can be seen, *and its admissibility to go before the jury determined,* and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be convicted, the testimony will certainly be considered by the judge who shall be called upon to exercise the large discretion given by the statute in imposing sentence in the case." (Our italics).

In the *Cameron* case, *supra,* counsel for the government presented (15 Fed. p. 794) a "learned and elaborate argument * * * to establish the proposition that this statute (R. S. Sec. 866) *applies only to civil causes." The court limited depositions in criminal cases to those states where their use for that purpose was permitted by "common usage".* Appellee does not inform us how many states of the Union sanction the use of depositions in criminal cases.

Whatever is attempted to be made from the deposition argument is answered by the fact that the Walsh Act does not authorize the issuance of depositions for the benefit of either the accused or the government. The method of securing testimony is limited to letters rogatory under *Section 1* and to the subpoena under *Section 2* (Act secs. 1 and 2).

Another new thought injected by appellee is:

(A. B., pp. 148-149) "The further argument of the appellant that letters rogatory are not compulsory process because the foreign country can-

not be compelled to execute them does not meet our answer that if the letters are recognized and executed, the accused has substantially equal process, *and if they are not so recognized, compulsory process for the witness abroad is available.*" (Our italics).

We answer with the terms of the Act. *Section 2*, which is the only part of the Act authorizing the issuance of subpoenas, confines itself entirely to subpoenas "desired by the attorney general or any assistant or district attorney acting under him." If it were the fact, which it is not, that the accused in a criminal case is entitled to letters rogatory under *Section 1* of the Act, such letters represent, therefore, the only process available to him, and we have already shown that letters rogatory are not equal compulsory process—are not compulsory process at all (Our first reply brief, pp. 42-44).

REPLY G

Arbitrary, unreasonable, capricious character of the Act.

Among the elements which we submit establish the arbitrary, capricious, unreasonable character of the Act, as pointed out by us in our earlier briefs (first brief, pp. 40-41; first reply brief, pp. 44-45) is the provision which makes the ownership of "non-offending" property a condition precedent to judgment of guilt of a criminal offense.

As to this appellee argues that the property is no more "non-offending" than is the property which is seized in "foreign attachment" cases. We shall try again to make the distinction clear.

The presumption of innocence inheres in the trial of an offense. It inheres in the trial of criminal contempt

cases. *Gompers* v. *Bucks Stove and Range Co.*, 221 U. S. 418; *Michaelson* v. *U. S.*, 262 U. S. 42. The money claim in connection with the trial of an offense cannot arise until after the presumption of innocence has ceased to exist, until after the evidence is in and guilt has been adjudged. The concurrent existence of a claim for a fine and the presumption of innocence which presumes that a fine will not be adjudged is, therefore, a self-evident impossibility. On the other hand, the claim of indebtedness (which cannot be reconciled with the presumption of innocence in the trial of a criminal offense), whether it sounds in contract, torts, inchoate matters, or otherwise, and whether stated or to be determined, inheres in, attaches to and has logical place at the trial of the issue of indebtedness in all so-called "foreign attachment" or *quasi in rem* cases.

Appellee denies that it is a fundamental right of a citizen to have his property and person protected by his Government while he deliberately refuses to perform his obligations of allegiance to the country. This merely assumes the correctness of appellee's entire case, as does also the later thought that appellant deliberately put himself in a position where he forfeited some of his fundamental rights as a citizen "not guaranteed by the Constitution" (A. B., p. 153). We add that it is difficult to conceive of "fundamental rights" of a citizen which are not guaranteed by the Constitution.

The reference to appellant having "flouted the Government" (A. B., p. 153) is rhetorical rather than factual. The record shows that resistance to the Act and the procedure under it which appellant considers to be unconstitutional, has been entirely respectful. This is illustrated by the fact that on the return day of the subpoenas in 200, counsel appeared specially for appellant and attempted to explain to the trial court why he was not there, that he did not "desire even to appear to flout or be disrespectful of the process of" that court. The explanation was not permitted (R. 200, pp. 10-11). It is further

illustrated by the earnest, serious character of the proceedings from the trial court to this court initiated and maintained by defendant to vindicate what he and his counsel believe are his constitutional rights.

PROCEDURAL POINTS.

Introductory Statement.

Appellee brings forward an excerpt from one of appellant's briefs in the trial court to the effect that the proceedings in 200 were "taken in exact pursuance of the Act." (A. R., p. 154).

This statement, more narrowly expressed than intended, was for the purpose of the motion to vacate, in order to strip the argument which we then made of everything other than constitutional questions. It is clearly apparent from the record that such was the purpose of the statement. That petitioner had no intention of making an admission in the further progress of these causes is abundantly evident from the vigor with which every step of the proceedings was challenged (R. 200, pp. 39-51, 52-58, 67-68, 72-85; R. 201, pp. 21-32, 35-42, 50-53, 56-81). Moreover, the procedural points being jurisdictional, they could be raised even on review. The court below does not mention appellee's suggestion.

Reply H-a—No proper showing for subpoenas.

Section 2 of the Act makes a "proper showing" the condition precedent to the issuance of the subpoena. We have made the point that the showings in these cases were nothing more than showings of a state of mind—a series of beliefs (R. 200, pp. 1-3; R. 201, pp. 1-2).

Reference to the record will show the complete correctness of this and we emphasize it now because counsel for appellee at the oral hearing said:

> (Stenographic transcript of oral argument before this court, pp. 29-30) "In the first place, counsel representing the Government filed a motion or petition with the court, in which, in substance they said *that they were informed* and believed, I am not using the exact language, that this witness had certain information that was material in the case * * *"

The allegation that counsel were "informed" does not appear in their showings to the trial court (R. 200, pp. 1-3; R. 201, pp. 1-3).

The argument that counsel could not show more than their "belief" for the reason alleged by them that the desired witness left the country upon the approach of clouds of danger, and that he had refused on letters rogatory issued in a previous civil case, to give more than his name, has no relevancy to the question of whether a "belief" can be a "proper showing".

There is nothing before this court except this unsupported statement that the desired witness "left the country upon the approach of clouds of danger". In view of this unfair gratuity, we take the liberty of saying that when appellant, on February 21, 1925, appeared before a judge of the Civil Tribunal of the First Instance of the Seine at Paris, France, he was first duly sworn and then declined to answer the questions included in the letters on the grounds that he had retired from business, did not intend to be drawn into the controversy, and had done nothing contrary to law, honor or morality directly or indirectly concerning the matter. In response to the inquiry of counsel for the Government, the French court stated that appellant was not required to answer. In this connection it may be interesting to note that the civil fraud action out of which the letters issued was commenced in March 1924; that in September 1924, coun-

sel for the Government, in connection with a motion for a continuance, declared themselves ready for trial and insisted upon trial on the date then set, to wit, October 7, 1924; that it was not until December 16, 1924 that counsel for the Government requested a continuance on the ground that defendant and others had "information and could give testimony *vital to the issue*" (Record No. 7188, filed September 28, 1925, in C. C. of A. 8th Circuit, in *United States* v. *Mammoth Oil Co.*, pp. 122, 200, 201, 546, 547). It is not alleged that appellant's testimony was before any Grand Jury or representative of the Government.

Appellee resorts to the dubious expedient of suggesting that the court "may have inquired further and orally of counsel concerning the foundation for their belief." If so, it was not a "proper showing" and if so there is nothing of the kind in the record.

Appellee runs amuck in this point with unfair innuendo. The statement—"surely, the appellant does not contend that he was entitled to notice of the application to subpoena him so that he could prepared himself to dodge service", is a flagrant example. (A. B., p. 156). How utterly unwarranted, is shown by the record. Consul Orr's return to one of the subpoenas issued in 200 shows that the service was made *"at the usual residence of the witness, rooms 501-502-503, Hotel Plaze Atheneé, 25 Rue Montaigue, Paris, France.* * * *"* The returns on all subsequent subpoenas and orders to show cause show that the services were made on appellant at Paris, France (R. 200, pp. 9-10, 12-13; R. 201, pp. 5, 14).

Appellee cites cases which it claims support its statement that one who fails to obey a subpoena or an order to show cause or other order of court "valid on its face and issued pursuant to jurisdiction of the court of the parties and subject matter" cannot question the sufficiency or regularity of the proceedings leading up thereto, or the form or sufficiency of the showing for the issuance of the subpoena or order. (A. B., pp. 156-157).

None of the subpoenas or orders served on appellant was "valid on its face." Not one of the subpoenas identified itself with the special Act. They were all in the form of general law subpoenas. Carrying that appearance on their faces and served extra-territorially they were invalid and might be disregarded. Likewise, the orders to show cause did not identify their unidentified contempts with the special Act in question. The only reference to the Walsh Act in any paper served upon appellant was in the order to show cause in 200 and there the reference was to a direction for the order's publication in the Washington Evening Star (R. 200, pp. 7, 9, 11-12; R. 201, pp. 4, 11-12).

It is not important here whether one who fails to obey the process of a court "issued pursuant to jurisdiction of the court of the parties and of the subject matter" may or may not question the sufficiency or regularity of antecedent proceedings. In the cases at bar the special Act in question provided that there must be a "proper showing" for the issuance of its subpoenas. Being obviously for the protection of the citizen, the provision was mandatory and jurisdictional.

In *French* v. *Edwards*, 13 Wall. 506, this court said:

> (p. 511) "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. *But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be in-*

juriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise." (Our italics).

Reply H-b—Subpoenas did not carry notice of the Act.

The subpoenas did not carry notice of the Act (R. 200, pp. 7, 9; R. 201, p. 8). Appellee argues that appellant knew about the Act and that he had actual knowledge that the subpoenas issued under it. If appellant had been the author of the Act he could not have known that the subpoenas served upon him were under the Act's authority. Appellant and his counsel might have engaged in limitless conversation over the Walsh Act and its unconstitutionality and over the subpoenas in 200—the only subpoenas which had been served at the time of the conference between Mr. Battle and appellant (R. 200, p. 77; R. 201, p. 70)—without the slightest possibility of having been able to identify those subpoenas as having issued under that Act.

The Act is special, is in derogation of the common law and the burden of showing strict compliance is upon the Government. The records before this court show that the Government relies on general law subpoenas and not on subpoenas under the special Act, and therefore, because served extra-territorially, relies on invalid subpoenas (R. 200, pp. 7, 9; R. 201, p. 8).

And if appellee had *actual knowledge* of the fact that the subpoenas issued under the Walsh Act *as distinguished from notice conveyed by the subpoenas themselves or other official notice required by the Act,* it would not supply the omission.

In *Wuchter* v. *Pizzutti,* 276 U. S. 13, this court said:

(p. 24) "But it is said that the defendant here had actual notice by service out of New Jersey in

Pennsylvania. He did not, however, appear in the cause and such notice was not required by the statute. Not having been directed by the statute, it cannot, therefore, supply constitutional validity to the statute or to the service under it." *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co.* v. *Stockyards Co.,* 212 U. S. 132, 144; *Central of Georgia Ry. Co.* v. *Wright,* 207 U. S. 127, 138; *Security Trust Co.* v. *Lexington,* 203 U. S. 323, 333; *Roller* v. *Holly,* 176 U. S. 398, 409; *Stuart* v. *Palmer,* 74 N. Y. 183, 188; *Berryhill* v. *Sepp,* 106 Minn. 458.

Reply H-c—Lack of notice to the petitioner in the case at bar of the facts constituting the offense and the claims against his property.

The only notice which appellant received of his alleged offenses and of any alleged claims against his seized property consisted of the unsupported orders to show cause which we have already excerpted in connection with our constitutional notice point (pp. 49-51, *supra*).

Those citations, as has been pointed out, do not specify or identify the offense or make any claim against appellant's seized property. It is said, however, that if appellant was in doubt he might have found the papers in the records of the court, and that counsel do not deny receipt as a matter of courtesy from the solicitors for the Government of the petition and other papers; that appellant could not have appeared specially without knowing the charges he was denying (A. B., p. 163).

This is all disposed of by the rule on several occasions repeated by this court—that notice under special acts must be officially conveyed and mandatorily required. *Wuchter* v. *Pizzutti,* 276 U. S. 13, 24, and cases therein cited.

The statement is made that, "counsel for appellant received copies of all pleadings" (A. B., p. 163). If by

this appellee means that such pleadings were received officially, the statement is utterly incorrect and very misleading. There is nothing in the record to support it.

Reply H-d—Abandonment of levy and seizure in 200.

We have already answered everything stated by appellee (our first reply brief, pp. 50-51), except the new theory that the attachment is not jurisdictional; that the service on appellant of the orders to show cause validated the punitive procedures (A. B., p. 165).

We submit we have established that the attachment is jurisdictional (p. 43, *supra*). Without repeating all of the reasons we simply invite attention to the fact that under the Act no possible authority can be deduced for publishing or serving the order to show cause unless the Marshal has first made the levy (Act, sec. 6).

Reply H-e—Petitioner not subpoenaed to attend a trial on April 9, 1928 (Case 201).

Appellee's entire argument to support appellant's conviction of criminal contempt for failing to appear on a date not commanded comes to this: the subpoenas contained "not depart" clauses; that the "not depart" clauses were provisions of general law subpoenas; that general law subpoenas may be used on the principle "too well known to require the citation of authority that acts of unlimited scope, such as *R. S., Section 877, supra,* are enforced in every respect not inconsistent with acts of limited applicability", and that "the law is well settled that a witness is required to attend court from time to time and term to term until the case is tried or until he is properly excused" (A. B., pp. 167-168).

This court has spoken on these matters:—

Galpin v. Page, 18 Wall. 350 (1874). Opinion by Mr. Justice Field.

"(p. 367) The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, *and also over proceedings which are in accordance with the course of the common law.*"

"(p. 370) 'However high the authority to whom a special statutory power is delegated,' says *Mr. Justice Coleridge,* of the Queen's Bench, 'we must take care that in the exercise of it the facts giving jurisdiction plainly appear, and that the terms of the statute are complied with. The rule applies equally to an order of the Lord Chancellor as to any order of Petty Sessions.' *Christie* v. *Unwin,* 3 Per. & Dav., 208.

(p. 371) 'A court of general jurisdiction,' says the Supreme Court of New Hampshire, 'may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. *The jurisdiction in such cases, both as to the subject-matter of the judgment, and as to the persons to be affected by it, must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. Morse* v. *Presby,* 5 Fost., 302.

(p. 371) The qualification here made that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption

of jurisdiction will usually attend the judgments of the Court as in cases falling within its general powers. Such is the purport of the language and decision of this court in *Harvey v. Tyler*, 2 Wall. 332 (69 U. S., XVII, 871). *But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record.*

(p. 372) *The extent of the special jurisdiction and the conditions of its exercise over subjects of persons necessarily depend upon the terms in which the jurisdiction is granted, and not upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued because the same court may possess over other subjects or other persons a more extended and general jurisdiction.*" (Our italics).

Boswell's Lessee v. *Otis*, 9 Howard, 336.

(p. 350) "No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And every departure from this fundamental rule, by a proceeding in rem, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court. This would dispense with the forms of the law prescribed by the legislature for the security of absent parties. *The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill. If this*

cannot be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void." (Our italics).

Examining the Act in the light of the foregoing, we find no reference to R. S. Sec. 877; no reference to term subpoenas; no reference to general attendance subpoenas; no authority to include the "not depart" clause.

It follows that appellee's theory for construing appellant into contempt on April 9 is without the support of the special Act in question, and, therefore, cannot be accepted.

Respectfully submitted,

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